UNIVERSITY OF CANTERBURY

AN ANALYSIS OF SOME ASPECTS OF THE DEFENCE OF PROVOCATION IN HOMICIDE

A THESIS PRESENTED FOR
THE DEGREE OF
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by

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CHAPTER ONE

INTRODUCTION

It may well be wondered why it should be thought necessary or desirable to undertake now the review of an area of the law which was the subject of consideration and statutory modification a mere ten years ago. Had any change been necessary, it could have been accomplished then. In fact, the circumstances in which the Crimes Act was passed in 1961 have altered subsequently in three ways which, in combination, call into question once more the purpose and bases of the whole doctrine.

At present, the scope of the defence in New Zealand is succinctly stated by Section 169(1) of the Crimes Act, 1961 which provides that

> "Culpable homicide which would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation".

The remainder of the Section, and the succeeding one, deal with such matters as the definition of "provocation", the respective functions of judge and jury and one or two specific instances of what may or may not constitute "provocation". One important practical point, which is often overlooked or obscured by the heat which debates on the subject seem to generate, is that the main effect of a finding of manslaughter upon provocation by the jury is to afford the trial judge a discretion as to sentence which, by virtue of Section 172 of the Crimes Act, 1961, does not exist when the finding is one of murder. Apart from cases of homicide, the plea of provocation will not operate to change the character of the offence; but it is a matter which the presiding judge (or

magistrate) must take into account in his consideration of sentence.

What then has occurred since 1961 to suggest that the present law and its administration are in any sense unsatisfactory? To begin with, it would seem safe to say that the death penalty has now been itself permanently interred. Perverse though it may seem in a legal system which later countenanced the infliction of capital punishment for a vast number of offences, provocation was initially accorded formal recognition precisely to avoid the imposition of the death penalty. Throughout the course of this century, the retention of capital punishment has proved a constant source of debate.[1] More important, when the present Crimes Act came before Parliament in Bill form in 1957, capital punishment was retained, but in the 1959 Bill, it had been abrogated. After considerable debate, and a free vote, the provisions of the 1959 Bill prevailed, and the sentence for murder became mandatory life imprisonment. In other words, the provisions drawing the line between manslaughter and murder were drafted and enacted in an atmosphere of debate and uncertainty which must have had some effect on their content.

Secondly, since 1961, some confusion has arisen as to the role of provocation in the case of lesser offences, in particular in the case of attempted murder.[2] Although no

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1. For a summary of these events in New Zealand, see "New Zealand: The Development of its Laws and Constitution", ed. J.L. Robson, 2nd ed. pp.382-3.

2. See the decisions of Wilson J. in Smith [1964] N.Z.L.R. 834 and McKee (1968) unreported. Supreme Court, Christchurch, 23 July 1968. Per contra see Laga [1969] N.Z.L.R. 417. Bruzas [1972] Crim.L.R. 367.

attempt will be made to deal with this problem, it is submitted that an analysis of the present law in homicide cases will shed incidental light on this area.

Finally, there have been a number of reported cases dealing with the subject since its new treatment in the 1961 legislation. These are intrinsically worthy of some lengthy analysis; the question whether the aspirations and hopes of those who framed the legislation have been achieved merits examination in the light of these cases.

It may be as well to point out what this survey does not purport to do. No attempt will be made to assess the law in terms of sociology, psychology or physiology. Ultimately, these disciplines may unearth facts which show that the assumptions upon which the present law is based are ill-founded. But partly because so little is known in statistical terms about the circumstances in which provoked killings occur, why some but not others are moved to commit acts of homicidal violence, and partly because the law is in any case the product of the values of those who create and administer it, it has been considered preferable to assess the law on its own terms of common sense, completeness and most importantly self-consistency in terms of the rationale. Where the application of ordinary language philosophy has been thought capable of pointing up inconsistencies and ambiguities, it has been utilised.

Nor does this survey purport to be a complete statement of the present law relating to provocation. No attempt is made to either find or forge links between the different treatment afforded provocation in Sections 169-170, and

Sections 48-50 although some ties may well exist. Indeed, Section 170, the presence of which in the Crimes Act 1961 is explicable only in historical terms is not made the subject of examination at all. Nor is Section 169(7), whereas Section 169 (5) is accorded the most fleeting of references.

Basically, then, this thesis holds itself out to be no more than a discursive analysis of some of the more important and controversial areas of the law. In so far as it may be said to have any unifying theme at all, (and the pursuit of this is at best fitful and spasmodic), it is that the test which the law has chosen to palliate intentional killings, the anticipated reaction of a hypothetical ordinary man, is one whose fulfillment is essentially a matter of opinion. For this reason, coupled with the fact that a successful plea mitigates but never excuses completely, it is better that the opinion of the jury should be sought more frequently than it is at present. It will be submitted that as the law stands at present, there is a very real danger that the judges may unintentionally, in a desire to achieve uniformity, usurp the very function which the jury is best suited to perform, namely, to keep the law in step with current social and moral attitudes and values.

But the prosecution of this theme is very much a subordinate one, and the main purpose is to examine the law with a view to ascertaining why the distinction between provoked and non-provoked homicides is drawn. The somewhat limited framework within which this is undertaken must be mentioned.

There have been suggestions recently that the distinction between murder and manslaughter should be abolished altogether, and that there should be one single, undivided offence, culpable homicide, to which no mandatory provision as to penalty is attached. One repercussion which the adoption of this proposal would have, would be the abolition of the defence of provocation. This thesis will proceed on the assumption that, for a variety of reasons, these proposals will be found unacceptable. That being the case, the abolition of the defence of provocation could only work to the disadvantage of persons charged with murder. This reason alone militates heavily in favour of retaining the doctrine, whatever its contemporary justification may be. In addition, there is nothing in the cases themselves to suggest that the distinction drawn by the law is totally unworkable, however much difficulty it gives rise to in individual cases. Thus although some features of the defence will be placed under the microscope for the purposes of rational justification, the thesis itself rests on something of an unproven basic premise, which is that nothing has as yet occurred to suggest that the historical rationale of the rule, that a provoked killing is less serious than a killing from motives or revenge or greed, no longer has any validity.

This is subject to the exception, already mentioned, that the death penalty is no longer enacted in cases of murder. However, the law does still retain a mandatory penalty of life imprisonment for the most serious form of homicide. It may be that some would argue that the taking of the life of another, even under provocation, merits this penalty, and

that the distinction should no longer be preserved. Value judgments of this sort cannot be contradicted other than in their own terms, and all that can be said is that, until such views become more widely held, they cannot form the basis of any argument for reform.

Where comment is made about the rationale of the defence, or the various aspects of it such as the objective test, this is done, not so much to defend the doctrine from its reform-minded attackers at either end of the spectrum, but to assist in an evaluation of the law on the terms previously referred to.

Since the rationale of the doctrine is so much a matter of history, Chapter II will deal with its evolution, showing how it originated as a matter of historical accident and only gradually acquired its modern justification. The Chapter will also show how, from about the beginning of the eighteenth century, the law sought to impose limits as to what might or might not be provocation in a way which, in retrospect, makes the formulation of the reasonable man test seem almost inevitable.

Chapter III also serves a dual purpose. It attempts first to state the law. This is not quite as simple a matter as might be supposed, because it is by no means clear that the concepts used such as "self-control", "provocation" and "the ordinary man" have either settled "meanings" or functions. These questions are examined as the secondary purpose of the Chapter, and in their light, suggestions are made either as to what the law is, or where there seems to be room for dispute, should be.

Unfortunately, at least for purposes of tidy classification, it is impossible to achieve these objects without trespassing on the subject matter of Chapter IV, which deals with the adjectival matters of the functions of judge and jury and the burden of proof. These questions, particularly the former, have a profound effect on the content of the substantive law. Despite this, they merit separate treatment, if only because of the interesting way in which the issues have been handled at various stages in the history of the defence. Indeed, as has been mentioned, it will be suggested that if any area of the law is unsatisfactory, this is perhaps the most important one, and the one which most merits consideration for purposes of reform.

CHAPTER TWO

HISTORY

A) Origins:

In 1576, one Robinson became engaged in a sudden fight. His adversary fled, but Robinson, pausing for a moment to collect his staff, pursued his unfortunate victim and beat him to death. He was charged with murder, but convicted of manslaughter only, because "tout fuit fait in un continuing fury",[1] and the offence of manslaughter upon provocation was born.[2] Earlier historians, in particular Stephen and Maitland,[3] have assumed that this innovation occurred as a result of a slight shift in the boundaries between the long-distinct offences of murder and manslaughter. More recent researches indicate that the law relating to homicide was in a state of considerable uncertainty and change throughout the Tudor period, and that manslaughter, as a separate substantive offence, is a creature of the courts and legal writers of Elizabethan England. Thus, although the formal recognition

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1. The writer is heavily indebted to an article by J.M. Kaye for some of the information contained in the earlier part of this chapter. See his "The Early History of Murder and Manslaughter" (1967) 83 L.Q.R. 365. The passage quoted is from Crompton, L'office et aucthoritie de Justices de Peace (1587), fo.24a.

2. Stephen, 3 H.C.L. 87, states without giving examples, that some of the cases dealing with provocation, "especially in the early part of the sixteenth century, were decided by the full Court upon special verdicts". This is probably a slip of the pen as he has elsewhere noted that "The law as to the effect of provocation is traceable as far back as Coke but not much further". General View, 2nd ed. 141. The Third Institute was completed in 1628, although not published until 1641.

3. 3 H.C.L. 43-44; Maitland, "The Early History of Malice Aforethought" (1883) Collected Papers, Vol.1, 304.

of a provocative incident as a mitigating factor certainly marked a departure from the earlier law, it was less radical a step than Stephen and Maitland have suggested.

Probably the major solvent in this state of flux was the gradual withdrawal of benefit of clergy from various types of culpable homicide,[4] and in particular a Statute enacted in 1531 withdrawing clergy from "any wylfull murder of malyce prepensed".[5] Homicide had for the first time been made the subject of statutory enactment in 1390.[6] For some time before the passing of the Statute, the Commons had been displeased at the ease with which the Crown granted pardons in the case of felony, and in 1390 presented a petition against the practice. The response of the Crown took the form of a Statute[7] which provided that, for the future, no pardon was to be allowed for, inter alia, "Murdre, Mort d'ome occis par agait, assaut, ou malice prepense", unless the particular crime pardoned was mentioned in the charter itself, and justices had satisfied themselves that the homicide which had occurred did not fall within one of the named categories.

According to Maitland, the effect of the Statute was that a killing was termed "murder" whenever it was committed by stealth, ambush or by "assaut", (which he dismisses as a "rather wider" version of ambush). If this is so, it would

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4. See Holt, C.J. in Mawgridge (1706) Kel.119, 121.84 E.R. 1107, 1108.

5. 23 Hen.8, c.1. (1531) This was the culmination of a series of Statutes, of an increasingly comprehensive nature, withdrawing clergy from homicide.

6. Stephen, 3 H.C.L. 44, asserts that this may be regarded as an "indirect ... definition", but this is really something of a misdescription.

7. 13 Rich.2, s.2, c.1.

mean that the definition of murder by specification of circumstances was, even at the time of the passage of the Statute, anachronistic, because all three were in any case subsumed under the general rubric of "malice prepense", an expression which Maitland translated literally to mean pre-meditation or pre-conceived ill-will.

At that time, only two kinds of killing were regarded as non-culpable, namely where death occurred se defendendo or per infortunium. Maitland assumes that there was a residuary group of homicides, cases in which no malice could be shown, which must be presumed to have remained pardonable as before, and it was this group which later became known as manslaughter or chance medley.

Kaye's disagreement with this thesis is largely one of emphasis. To begin with, he stresses the fact that, for a considerable period after 1390, all culpable homicide was equally capital. There was thus no reason why the judges should attempt to divide one kind of culpable homicide from another. The important dividing line was that which marked off culpable homicides from those covered by such defences as self-defence and misadventure. He argues that it was this area of the law which remained the focal point of the judges' attention until the first half of the sixteenth century, and the judges continued to regard culpable homicide as a single undivided offence.[8]

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8. Stephen, who agrees with Maitland, does note that the distinction between his residuary category and murder was one without effective difference in that all homicide, unless it was committed se defendendo or per infortunium was punishable with death and within benefit of clergy. The significant fact, it is submitted, is that manslaughter upon provocation was in fact evolved at a time when manslaughter generally was a new concept.

Secondly, Kaye maintains that "malice prepense", as used in the Statute, did not have reference to a state of mind, or a preconceived plan of any sort, but was simply a shorthand form of referring to those homicides which did not fall within one of the two accepted categories of excuse.

B) Manslaughter upon a sudden encounter:

According to Kaye, this position persisted almost unchanged until the turn of the sixteenth century. By that time, "murder" was almost invariably qualified as being committed "upon malice aforethought", but in none of the statutes in which it appears does Parliament attempt to define it. Kaye asserts that if it had acquired any positive meaning at all, it could best be translated as "wickedly" or "deliberately", and was probably used in this sense by Parliament in the 1531 Statute. At all events, it may be safely concluded that the expression was of little or no definitional significance.

At the same time, writers were beginning to note distinctions within culpable homicide, referring to the lesser form indifferently as manslaughter or chance medley. But the references are so brief and imprecise that it is impossible to ascertain what the real point of those distinctions was. For example, an early manual for justices of the peace says that

> "manslaughter is whare two men or mo meet and by chance medley they fal at affray so that one of them sleeth another (this) is but felonye in hym self...." 9

It is not clear from this whether any killing, even a

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9. The Boke of Iustyces of the Peas (1510) at fo.4 a/b 15.

deliberate one, would be excused simply because it took place in the course of such a fight, or whether there had to be other extenuating circumstances such as that the killing occurred by accident or under provocation. Similar comments may be made of Fitzherbert's account of the law, which was written, significantly enough, shortly after the 1531 Statute.

> "... and so appereth ye diversitie between Murder and Manslaughter of which the one cometh by malyce prepensed and the other but by chaunce." 10

These references do indicate that the withdrawal of clergy had a fairly immediate impact on the development of the substantive law, and that the judges were reluctant to sentence to death all persons guilty of culpable homicide. But it was not until the middle of the sixteenth century that the law began to precipitate into firm general principles.

In Herbert's case[11] the Courts struck a surprisingly modern note. Herbert and a number of his followers went to the house of Sir Richard Mansfield with the intention of starting a fight with its occupants, but without intending to cause death. Whilst they were milling aronnd outside, a woman (who may have been a member of the household, or simply a passer-by), attempted to intervene. One member of Herbert's party threw a rock at her, which struck her on the head and killed her. On one point at least, the Court was unanimous; if the woman was a member of the household, and was thus within the contemplation of the parties from the outset of the venture, the verdict would be one of murder on the basis that the

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10. New Boke of Justices of the Peace. Published by Berthelet (1544) p.cxxiiia. The work was first published in 1537.

11. (1558) Dyer 128b; 73 E.R. 279.

killing took place in the course of an unlawful act of violence directed at the person slain, or at the group of which she was a member. At issue was the liability of a person killing by accident in the course of an unlawful act of violence directed at someone other than the person actually slain. Had the act been lawful, (a possibility which was not even canvassed by the Court) the killing would have been per infortunium. In the event, the judges were divided over the question of fact as to the status of the woman as a member of the household, and the end result of the case is not known. But some principles do emerge from the examples given in the case; a killing was committed with malice prepense and was murder either where there was a deliberate application of force to the person of another, however spontaneously the intent was formed, or where the killing occurred accidentally in the course of an unlawful act of violence which was directed at the party slain.

Had these principles become established and been applied consistently, it is doubtful whether the doctrine of provocation would ever have seen the light of day. However, shortly before the decision in Herbert, the case of Salisbury[12] had been decided. A group of men had conspired to ambush and kill a Doctor Ellis. Their plan failed to the extent that they succeeded in killing, not Ellis but one of his servants, whether by mistake or in the ensuing fracas cannot be ascertained from the Report. Salisbury was the servant of one of the

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12. (1553) Plowd. Comm. fo.100; 75 E.R. 157. Kaye accounts for the fact that the case was not mentioned in Herbert by pointing out that it was an assise case tried before a Court of entirely different composition, and would not have become widely known until the appearance of the Commentaries in 1571.

conspirators, and although he was in the vicinity, he had not been apprised of their plans. However, the Report tells us that

> "when he saw them fighting together he suddenly took part with them, having no malice prepense, and with them wounded the man who subsequently died".

Along with the others, Salisbury was indicted for murder, and in the course of the trial, the jury asked whether, if the facts were as Salisbury maintained, he was guilty of murder or manslaughter only. The ruling given was that

> "si John Vane Salisbury navait malice prepense, coe est manslaughter en luy et nemy murder, pur coe qe il navoit malice prepense".

Had the case proceeded on the principles which were subsequently expounded in Herbert, a conviction for murder would have been proper on the basis that Salisbury took part in an unlawful act[13] of violence directed at the party slain. Instead, the Court interpreted the expression "malice prepense" literally, to mean a preconceived plan to kill. Because, it appeared that, as far as Salisbury was concerned, the quarrel was a sudden one, the verdict was manslaughter only.

It was this case which was fastened on by later writers such as Crompton and Lambarde to support their proposition that any killing, provided that it took place in the course of a sudden encounter, should be no more than manslaughter. Whereas previously, the courts had concentrated on the question whether the killing itself occurred by accident, they now turned their attention to the circumstances in which the parties met, and

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13. This would have necessitated an inquiry into whether Salisbury thought himself to be defending his master from an unlawful attack. The view actually taken by the Court rendered such an inquiry redundant.

Robinson's case,[14] in which the parties had become engaged in a sudden fight, was in effect a straightforward application of the sudden encounter rule. Even so, the remark about "continuing fury" is evidence that the Courts were almost immediately attempting to rationalise the sudden encounter rule, and had already begun to formulate the doctrine which was so drastically to reduce its scope.

According to Kaye[15] some difficulty was experienced in applying the new rule, particularly where there was some prior animosity between the parties, or where the killing occurred some time after their initial encounter. The rationale given by the commentators such as Crompton and Lambarde for the manslaughter concept was that it was a bearing with the infirmity of human nature.

C) Manslaughter Upon Provocation:

The bridge between the sudden encounter doctrine and modern notions of provocation is to be found in the concept of implied malice, the role of which is very clearly explained by Hale.[16]

> "When one voluntarily kills another without any provocation, it is murder, for the law presumes it to be malicious, and that he is hostis humani generis; it remains therefore to be inquired, what is such a provocation, as will take off the presumption of malice in him that kills another."

It was quickly realised that an extension of the sudden encounter rule to all cases of culpable homicide would have

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14. Supra n.1.

15. op.cit., 590.

16. 1 Hale P.C., 455.

proved undesirable as a matter of policy. But instead of providing that in such situations, no malice in the Salisbury sense was required, the Courts resorted instead to the fiction of implied malice.

In Herbert's case, it was accepted that if a killing occurred in the course of an unlawful act directed at the party slain, the malice aforethought of murder had been established. This rule was retained, even after Salisbury, and even extended shortly afterwards in the case of Saunders,[17] in which the principle of transferred malice was enunciated, with the result that the requirement that the act be aimed at the victim was abandoned. It was also decided in Young's case[18] that if the victim of the killing was an officer of the peace acting in the execution of his duty, the case was murder

> "though the murderer knew not the party slain and although the affray was sudden".

In both of these cases, the rationalisation given was that the law implies malice.[19]

More important for present purposes is the fact that, very little time elapsed after the appearance of Plowden's Commentaries before the same device was being applied where a man was slain without provocation. In his Institutes, Coke writes simply that

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17. (1573) Plowd. Comm. fo.473-476; 75 E.R. 706.

18. (1586) 4 Co.Rep. 40a.; 76 E.R. 984.

19. It is central to Kaye's thesis that "cases of this kind were not later exceptions to a long established rule requiring premeditation, but were simply instances of the old pre-sixteenth century law of murder which, for policy reasons, were permitted to survive the change in the definition of the crime generally". op.cit., 370.

> "Malyce implyed is in three cases: first in respect of the manner of the deed. As if one killeth another without any provocation of the part of him, that is slain, the law implieth malice". 20

It is not entirely clear how this rule developed, but it may have been through an extension of the rule that, where a man made a sudden attack upon another, catching him off his guard, he was guilty of murder despite the absence of premeditation.[21] A situation of this sort, in which there was also a slight element of provocation occurred in Watts v. Brain.[22] The evidence given on an appeal of murder brought by the wife of the deceased was that, on the two days preceding the fatality, the defendant and the deceased had come to blows. The defendant claimed that, on the day in question, the deceased had passed his butchers shop and "smiled upon him and wryed his mouth at him", whereupon the defendant immediately took up a knife, chased his victim and struck him from behind on the calf of the leg, killing him. Croke who was a member of the Court, reports that this was held to be murder

> "for it shall be presumed to be malice precedent; and that such a slight provocation was not sufficient ground or pretence for a quarrel".

Subsequent writers, in treating this case, have emphasised the lack of gravity of the provocative incident as the decisive factor in the reasoning of the Court.[23] What is less clear is the reason why malice was implied at all. It is

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20. Vol. 3 Co.Inst. 51.

21. Burchet (1574) Crompton fo. 22b.

22. (1600) Cro.Eliz.778; 78 E.R. 1009. Also reported sub. nom. Watts v. Byrne Noy 171; 74 E.R. 1129.

23. 1 Hale P.C., 455. And see Holt C.J. in Mawgridge (1706) Kel. 119, 131; 84 E.R. 1112.

submitted that there is considerable merit in Kaye's argument that the real reason for the implication of malice was not that there had been a sudden killing without adequate provocation but that the deceased had been caught off his guard,[24] especially in the light of the so-called Statute of Stabbing[25] passed only four years after the decision. According to its preamble, this measure was enacted "To end ... stabbing and killing men on the sudden". To effect this worthy end, it was provided that

> "Every person ... which ... shall stab or thrust any person or persons that hath not then any weapon drawn, or that that not then first stricken the party, which shall so stab or thrust so as the person so stabbed or thrust shall thereof die within the space of six months then next following, although it cannot be proved that the same was done of malice aforethought, ... shall be excluded from the benefit of his clergy, and suffer death as in the case of wilful murder."

If Watts v. Brain were authority for the more general proposition that, in every case of a sudden killing, the law will imply malice, there would have been little need for the Statute to single out two specific instances in which proof was unnecessary. Further, it is impossible to suppose that the Court found the requisite malice in the prior disagreements of the parties; again, there would have been no need for any presumption at all.

The extension may well have been the result of Coke's own influence on the development of the law. As authority for the proposition, he cites dicta from his own report of

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24. Op.cit., 590-591.

25. 2 Jac.1, c.8.

Mackallye's case,[26] and there are indications that not all were prepared to share his views before he wrote. For example in Royley's case,[27] decided the year after Mackallye, the father of a boy who had been beaten in a fight, upon being informed of the incident by his son, took up a "little cudgel", ran the distance of a mile and struck his son's opponent, killing him. The Court, of which Coke was not a member, resolved that the offence was manslaughter only, because the killing had occurred on a "sudden occasion", and because there was no prior malice,

> "and will not presume it to be upon any former malice unless it be found".

The case is also reported by Coke himself,[28] but the passage cited does not appear in his account. Stephen comments[29] that Coke does not seem to have seen the importance of the case, and makes no mention of it in his Institute, but it would seem at least equally possible that Coke was fully aware of its importance, but omitted it because it was at variance with the point of view which he was concerned to advance. Be that as it may, his assertions eventually carried the day, and

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26. (1611) 9 Co.Rep. 61.b; 77 E.R. 824, where he said that, "If one kills another without provocation, and without any malice prepense, which can be proved, the law adjudges it murder, and implies malice: for by the law of God every-one ought to be in love and charity with all men, and therefore when he kills one without provocation, the law implies malice: and ... they may be indicted generally, that they killed of malice prepense, for malice implied by law, given in evidence is sufficient to maintain the general indictment". fo.67.b.; 77 E.R. 833.

27. (1612) Cro. Jac.296; 79 E.R. 245.

28. 12 Co.Rep. 87; 77 E.R. 1364.

29. 3 H.C.L. 59.

subsequently, whenever a killing was proved to have occurred upon the sudden, there was a prima facie presumption that the killing occurred with that degree of malice necessary to sustain a conviction of murder. It was then for the accused to show, where he was permitted to do so, that he had acted without malice because of provocation.

Although Stephen asserts that the presumption of malice was initially one of fact only, and later became one of law,[30] (and would then apply even where the absence of premeditation was conclusively proved), it is submitted that this account is an oversimplification, and ascribes to the law of the day a degree of sophistication to which it did not at the time aspire. Rather, the status of the presumption was a product of the view which was then taken as to the respective functions of the judge and jury. Although there was no actual authority on the point, it would seem that it was always open to a jury to return a general verdict of either murder of manslaughter.[31] But reported cases in which this procedure was adopted are the exception rather than the rule, and in a large majority of the earliest reported cases, a special verdict was returned.[32]

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30. 3 H.C.L. 63; without citing any authority.

31. Oneby (1727) 2 Ld.Raym. 1485, 1494; 92 E.R. 465, 470.

32. Herbert (1558) Dyer 128b; 73 E.R. 279. Salisbury (1553) Plowd. Comm.fo. 100; 75 E.R. 157. Mackallye (1611) 9 Co. Rep. 61.b.; 77 E.R. 824. Royley Cro.Jac. 296; 79 E.R. 254. Holloway (1628) Cro.Car. 131; 79 E.R. 715. Williams (1639) Jones W. 432; 82 E.R. 227. The Protector v. Buckner (1655) St. 466; 82 E.R. 867. Huggett (1666) Kel. 59; 84 E.R. 1082. Thomson (1667) Kel. 66; 84 E.R. 1085. Grey (1666) Kel. 133; 84 E.R. 1113. Maddy (1672) T. Raym. 212; 83 E.R. 112 (sub.nom.) Manning.

Even in those few cases in which the issue was determined by the jury, the directions given were usually quite specific; for example in Watts v. Brain,[33] the Court "delivered the law to the jury, that it was murder". And in one case of particular importance, Lord Morley's case,[34] which established the rule that words alone could not amount to provocation, the law was established by all the judges of England, who had met, two days prior to the trial of Lord Morley by his peers, to consider such points of law as were expected to arise in the course of the trial.

The first case to deal expressly with the separate issues involved, viz. the occurrence of the circumstances constituting the alleged provocative incident, as distinct from their legal efficacy, did not occur until 1666. Kelyng's Report of the case notes rather tersely that it appeared upon the evidence that the accused had killed his victim without provocation. Kelyng, who was the trial judge then directed the jury that the case was murder, because the law implied malice; although they were the judges of fact, their task as such was limited to saying whether or not it was the accused who had done the killing,

> "but whether it was murder or manslaughter, that was a matter in law, in which they were to observe the direction of the Court". 35

A rather more detailed exposition of the law was undertaken by the Court in Oneby,[36] which shows very clearly how

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33. Supra n.22.

34. Morley (1666) 6 St.Tr. 769.

35. Hood (1666) Kel. 50; 84 E.R. 1077. Even after this stern injunction, the jury were reluctant to find the accused guilty of murder, and were fined and imprisoned for their recalcitrance.

36. (1727) 2 Ld. Raym. 1485, 1494, 92 E.R. 465, 470.

little latitude was allowed to juries to decide whether the presumption of malice had been cast off. It was stated that it was for the judge to tell the jury that, if they believed the evidence of a particular witness or witnesses, the malice, express or implied, had or had not been established, and the proper verdict was murder or manslaughter as the case may be. Where the jury declined to find a general verdict, it was for the Courts to rule on the question of malice in the light of the facts found. It is thus submitted that there is no authority for the view that the presumption of malice was ever one of fact alone, and that all the indications are that, in so far as the question arose at all, it was probably more akin to a presumption of law. The importance of the point is that once it had been established that it was for the law to say what was such a provocation as would cast off the presumption of malice, the way had been cleared for the Courts to develop the law of provocation in a recognisably modern form.

D) Sufficiency: the Evolution of the Reasonable Man Test:

One feature of the modern law which has been subjected to a considerable amount of criticism[37] is the rule, first enunciated in Welsh,[38] that in order to constitute "legal" provocation, the provocative incident must have been such that an "ordinary" or "reasonable" man would have reacted to it in the same way as the accused did. It is submitted that, by comparison with the law which preceded it, the reduction

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37. E.g. Edwards; "Provocation and the Reasonable Man" [1954] Crim.L.R. 898. And see post p.64.

38. (1869) 11 Cox C.C. 336.

of the question of sufficiency to one over-riding test removed some elements of capriciousness from the law, and at least paved the way for a more realistic assessment of the amount of tormenting which "human frailty" may be expected to withstand.[39]

In the earliest cases, the Courts did not articulate any general criteria according to which they would decide whether or not the provocation offered was sufficient to reduce a killing to manslaughter. Coke does not allude to the issue directly, and according to Turner,

> "Neither in Hale nor in Foster is there anything to suggest that the Courts were consciously applying anything like the modern test of an affront such as would be likely to cause an 'ordinary' or 'reasonable' man to lose control of himself". 40

This comment is, however, somewhat misleading in its suggestion that there were actually no objective criteria at all, and that the defence would automatically operate whenever the accused actually lost his self-control.[41] In fact, although opinions as to what constitutes sufficiency may have varied throughout succeeding centuries, objective limitations (in the sense that the accused was expected to have exercised some degree of self-restraint) have been secured as part of the law, in a variety of guises, almost since Robinson was decided. That the

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39. This is not of course to argue in favour of retaining an objective test, nor to deny that the formulation of the objective requirements in terms of the "reasonable" man brought with it further difficulties.

40. Russell; 12th ed. 533-537.

41. See E.g. Brown, "The Subjective Element In Provocation" (1959) Malaya L.R. 288, 291, where it is said that "Hale and Foster considered that fulfilment of the subjective test alone was enough to ensure the successful operation of the defence". If by "subjective test", Brown means actual loss of self-control only, it is submitted that this opinion cannot be supported.

Courts were endeavouring to draw some boundaries to exclude the merely bad tempered is evident in Foster's remark that

> "... the outrage is considered as flowing rather from brutal rage or diabolical malignity than from human frailty; and it is to human frailty, and to that alone, the law indulgeth in every case of felonious homicide". 42

If this is not the overt expression of a "reasonable man" test, it is at least an indication that some tension was felt to exist between subjective and objective tests.

It is not really surprising that the Courts should have felt it necessary to restrict the scope of the defence by imposing objective conditions when it is recalled that, whereas the penalty for murder was death, punishment for manslaughter was, until 1822,[43] imprisonment for one year only. Initially, the Courts reaction to this conflict was typically pragmatic; each case was decided on its merits as it arose, according to common sense but broadly retributive criteria.[44] Explanations as to why particular incidents should be sufficient or otherwise to cast off the presumption of malice were neither called for nor proffered. Before long, a number of fairly detailed and specific rules had emerged, categorised according to the circumstances in which the actus reus had taken place, and in particular according to the nature of the provocative incident which had precipitated the killing. Although it was decided in Huggett[45] that

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42. Foster; 292.

43. Geo.4, c.38, made the offence punishable by transportation for any period up to life, or by imprisonment with or without hard labour for three years, or by an indeterminate fine at the discretion of the Court.

44. Of the sort to which Hart refers in connection with the modern judge's view as to his role in the sentencing process. See Punishment and Responsibility "Punishment and the Elimination of Responsibility", 158, 168.

45. (1666) Kel. 59; 84 E.R. 1082.

> "such a provocation as must take off the killing of a man from murder to be but manslaughter, must be some actual violence, or actual striving with, or striking one another",

in very few of the earliest cases does the incident take the form of a straightforward assault. In consonance with that rule, it had already been decided that mere gestures,[46] words alone,[47] the breaking of a promise,[48] and stealing[49] were insufficient, but the sight of one's friend in a fight,[50] the assault of one's son,[51] or unlawful imprisonment of either oneself or another,[52] might be.

It was then in the form of such all or nothing rules that the first efforts at determining questions of sufficiency were cast. As the law stood, no real attempt could be made to evaluate the gravity of the provocative incident once it had been found to fall literally within the terms of one of the established categories. In Dangerfield,[53] in which the alleged incident took the form of scurrilous words alone, the defendant was duly convicted, (although the restrictions of Huggett seem to have been forgotten or ignored in Maddy, where the incident relied on was the sight of the victim committing adultery with Maddy's wife).

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46. Watts v. Brain (supra n.22.)

47. Lord Morley (1666) 6 St.Tr. 769.

48. Clement v. Blunt (1625) 2 Roll.Rep. 460; 81 E.R. 916.

49. Holloway (1628) Cro.Car. 131; 82 E.R. 105. Jones W. 196; 79 E.R. 715.

50. Anon (1611) 12 Co.Rep.87; 77 E.R. 1364.

51. Royley (1612) Cro.Jac. 296; 79 E.R. 245.

52. Huggett (1666) Kel.59; 84 E.R. 1082. And see The Protector v. Buckner (1655) Sty. 466; 82 E.R. 867.

53. (1685) 3 Mod.R. 68; 87 E.R. 43.

Once the standards had been set by these earlier cases, such development of new rules as there was tended to proceed by analogy, and from about the middle of the seventeenth century, there was constant reference to them for the purposes of comparison. If the established rules seemed to be too uncompromising, their effect could sometimes be overcome by permitting the accused relief under some other rule. Thus if particularly provocative words were accompanied by even the most technical of assaults, they were taken outside the operation of the rule established in Morley's case[54] that words alone could not be a sufficient provocation.

For more than a century, the Courts avoided confronting the problem of sufficiency squarely. But there remained the logical problem of reconciling a verdict of murder with Coke's rule, which was phrased in such a way as to suggest that malice would be implied in the case of a sudden killing only where there was no provocation at all. Disquiet was particularly likely to be felt in cases where the alleged incident fell technically within the terms of one of the established rules, but which was in itself comparatively trifling. This troubling issue seems to have come to something of a head in two cases decided in the early years of the eighteenth century. Their significance is not so much in the law propounded in them, since there is little reference to them in the subsequent cases.

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54. Stedman (1704) Reported in Foster 292; Reason and Tranter (1722) 1 Str. 499; 93 E.R. 659. This practice persisted throughout later years, and perhaps the most striking illustration of the artificialities into which it lead may be found in the case of Smith (1865) 4 F.&F. 1066, in which a wife, having tormented her husband with her adultery, and the superiority of her lover, then spat at him. The spitting was held to be an assault, (whether the spittle actually hit him or not), and the plea of provocation succeeded.

What they do demonstrate, it is submitted, is a hardening in attitude of the Courts towards persons killing in hot blood, an attitude which is reflected in the works of Foster, Hale and East.

In the first, Mawgridge,[55] who was a guest of his victim Cope, caused a quarrel by abusing a woman fellow guest. When he refused upon request to desist, Cope then asked him to leave, whereupon he picked up a full bottle of wine and threw it at Cope, striking him on the head. Cope retaliated in kind, and Mawgridge, almost simultaneously drew a sword and delivered the fatal blow. None of the argument advanced on the special verdict is reported, but it would appear that one of the points taken was that, in returning the bottle thrown at him, Cope had himself committed an assault, and had thus provoked Mawgridge. Had the case proceeded according to well-established principles, this argument would have succeeded, since, although there had been a sudden killing, it had not occurred without provocation, and malice could not therefore be implied. It was held, however, that because of the circumstances surrounding the killing, Mawgridge had demonstrated express malice.

> "When a man attacks another with a dangerous weapon without provocation; that is express malice from the nature of the act which is cruel." 56

Because by his actions, Mawgridge had demonstrated express malice, Cope, in returning the bottle, was acting in self-

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55. (1706) Kel.119; 84 E.R. 1107. According to Stephen, 3 H.C.L. 68, this case was actually reported by Holt himself, and simply appended to Kelyng's Reports. Turner describes Holt's decision in Mawgridge as a "tangle of conceptions", and notes that it is difficult to see upon what principles he decides the question of when provocation may be pleaded. Russell 518, 12th ed.

56. ib. 129; 1112.

defence and lawfully, and this could not amount to provocation.

In Oneby,[57] Counsel for the accused argued that Mawgridge's case "carried murder further than it had ever been carried before". This seems to have been the case in two respects. Whereas Coke used the expression "malice" to denote a pre-conceived intention to kill or cause bodily harm, Lord Holt interprets it to include not only intention, but also the fact that the killing was unaccompanied by circumstances of excuse and was "wicked"; malice in the natural sense of the word. He is thus forced to explain the rule that malice is implied in the case of the killing of a peace officer acting in the execution of his duty by saying that "properly and naturally it was not malice, for his design was only to defend himself from arrest",[58] a design which presumably is understandable, and does not proceed from diabolical malignity. In fact, the reason why it was necessary to imply malice in such circumstances originally was simply that the requisite degree of forethought was rarely if ever present in cases where a peace officer was killed, and had nothing to do with the meaning of "malice". Such cases almost invariably occurred "on the sudden", and would have amounted to manslaughter only under the Salisbury rule[59] unless malice were implied. But despite the fact that Lord Holt may not have been able to reconcile his version of malice with the earlier law, the fact that this had undergone irrevocable change is clearly illustrated by Lord Raymond's

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57. (1727) 2 Ld. Raym. 1485; 92 E.R. 465. 2 Str. 766; 93 E.R. 835.

58. Kel. 130; 84 E.R.1112.

59. As to which see supra p. 13.

statement in Oneby itself that

> "In common acceptation, malice is took to be a settled anger (which requires some length of time) in one person against another, and a desire of revenge. But in legal acceptation, it imports a wickedness, which includes a circumstance attending an act, that cuts off all excuse." 60

A second extension of the law in Mawgridge is the view there taken that express malice can be gathered from the nature of the act itself. As authority for this proposition, Lord Holt cites Holloway's case.[61] There, the warden of a park had discovered a boy in a tree stealing pears. When the boy descended, as he was ordered to do, Holloway tied him to a horse, which ran away, breaking the boy's shoulder and killing him. Lord Holt argues that malice was held to be present because the act was a particularly cruel one. But in neither of the two reports of the case cited is there any reference to express malice. Indeed, in Palmerston's Report,[62] it is stated that the case was adjudged murder but that the "Court ne declara les reasons overtment", and in Croke's Report,[63] the case is said to have been based upon implied malice, "he having done it to one who made no resistance". The point that express malice could not be inferred from the nature of the

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60. 2 Ld. Raym. 1485, 1487; 92 E.R. 465, 467.

61. (1628) Cro.Car. 131; 79 E.R. 715.

62. Palm 545; 81 E.R. 1213.

63. Supra n.61. As is the case with Watts v. Brain (discussed supra pp.17-18), the probable reason for the implication of malice in the first place was not that there had been a sudden killing without sufficient provocation, as Lord Holt assumes, but simply as a variant of the rule that the victim had been caught off his guard.

act was taken by the Court in Oneby, where it is stated that Mawgridge is really based on implied malice, the malice being implied from the nature of the first act, i.e. throwing the bottle.

The facts of Oneby are not unlike those of Mawgridge. Accused and a number of others were playing at dice in a tavern when one Gower offered to stake half-pence when the others were playing for half-crowns. After an exchange of angry words, Oneby threw a bottle at Gower, hitting him on the perriwig, and Gower returned an object which missed its mark entirely. After an hour or so, Gower made an apology which Oneby refused to accept saying "no, damn you, I'll have your blood". As the group was leaving the tavern, Oneby recalled Gower, the door to the room was closed, and a clashing of swords was heard. Oneby received three cuts, but Gower was killed, although he acknowledged that "he had received his wounds in a manner among swordsmen called fair". The Court distinguished Mawgridge, which it said had really been decided on the basis of implied malice. However, it ruled that in using the words that he did in refusing to be reconciled, Oneby himself had demonstrated express malice, and the case was therefore stronger than Mawgridge.

One factor affecting the turpitude of Oneby's actions, and hence the malice displayed by him, was the length of time which elapsed between Gower's initial provocation (if such it could really be called), and the ultimate killing. Counsel for Oneby sought to evade the difficulties which this posed by arguing that the law had set no limits on the duration of a man's passion. The Court agreed with this proposition in

principle, pointing out that this would vary from individual to individual, and would depend on the circumstances in which the killing took place. It also allowed that it was for the jury to decide what the circumstances surrounding the killing in fact were. However, it insisted that it was for the Courts to draw inferences as to malice, and the deliberateness of the killing from those facts; it had previously been decided that the law was that if two persons meet and fight, and agree to fight the next day,

> "the passion must be looked on to be cooled.... To go a little further: if two men fall out in the morning and meet and fight in the afternoon, and one of them is slain; this is murder; for there was time to allay the heat, and their meeting is of malice." 64

It is submitted that these passages show that the Courts were prepared to treat the lapse of time as a question of law, where a considerable period of time had elapsed. Even if the accused had managed to sustain the transport of passion over such prolonged periods, he would have been excluded from the benefit of the defence. Where the period was somewhat shorter, the time element appears to have been an amalgam of similar objective considerations, and a test for ascertaining the genuineness of the accused's wrath from a subjective point of view. In the event, the Judges decided that "there had been sufficient time for Mr Oneby's transport of passion to cool", which is open to interpretation as either a finding that it had in fact cooled, or simply that the lapse of time was such that it ought to have done so.

It has been felt necessary to deal with these cases at some length because, it is submitted, they represent such a

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64. 2 Ld. Raym. 1485, 1495; 92 E.R. 465, 471.

marked change in the attitudes of the Courts towards the question of sufficiency, and are indeed, a significant step towards the evolution of the reasonable man test. They show that, although the doctrine originated almost accidentally, it had acquired ex post facto, by the turn of the century, an independent rationale. This may be summarised as a crude moral assessment that a killing committed under the sting of a recent provocation was less serious than a killing proceeding from other motives such as gain or revenge. Since the moral guilt of the accused was by comparison less, he deserved to be punished less. But balanced against the preparedness of the law to make some concessions to human failure were a number of considerations. To begin with, it was felt that society was entitled to expect of its members, certain standards of self-restraint, and a person who fell below those standards, and readily gave way to his anger, should not be entitled to the benefit of the defence. As a more practical problem, the law had to guard itself against the possibilities of persons taking advantage of its lenience by disguising as provocation, killings which in reality proceeded from other motives; it had to ensure that there was a genuine causal link between the provocative incident and the retaliation to it. By defining the touchstone of murder, "malice", to mean a "wicked vindictive disposition",[65] the Courts had created a concept which was both flexible and vague enough to allow them to give effect to each of these factors in their decision of any particular case.[66]

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65. Foster, 291.

66. Except in those cases in which the hands of the Courts remained tied by the rigid confines of some of the early rules, such as that words and gestures were insufficient.

It is difficult to trace the development of the reasonable man test through the remainder of the eighteenth century, mainly because of the dearth of reported cases. In his treatment of developments in the following century, Turner makes the following claims.

> "Accordingly when ... the judges established the rule that the facts of the alleged provocation must be left to the decision of the jury, we find that, as a guide to them, the judges told the jury that they must make up their minds whether the provocation was such that in their opinion it would have been enough to cause 'a reasonable man' to lose control of himself.
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> This direction to the jury presented them with a simple device for weighing the evidence in order to decide what was the vital question, as it always has been, and still is, namely, was the prisoner driven into a state of passion so that 'reason was dethroned from her seat'? This is a purely subjective matter." 67

This passage has been quoted in full because it presents, it is submitted, a distorted analysis of the changes which the law underwent in the early part of the nineteenth century. It also presents, by implication, a false picture of the law which preceded those changes. It is submitted that when the "reasonable man" made his first entry into this area of the law, he did so as an objective measure of the gravity of a provocative incident, and that Keating J.[68] was attempting to express, in an elliptic way, the notion that the law demands certain standards of self-restraint before making concessions to human frailty.

Such fleeting references as there are to the doctrine during the eighteenth century,[69] suggest that, although no

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67. Russell; 12th ed. 534.

68. In Welsh (1869) 11 Cox C.C. 336.

69. In the forty years immediately after Oneby, only one case is reported on the subject. Mason (1756) Fost. 132; 168 E.R. 66.

explicit distinction was drawn between subjective and objective considerations,[70] it was never enough for the defendant to show only that "reason was dethroned from her seat". Sir Michael Foster says that in cases of "slight provocation", if it can be shown that the defendant intended to kill or cause great bodily harm, the case is one of murder.[71] The issue would have been greatly simplified had Foster posited some test whereby "slight" provocation might be differentiated from grave, but he gives none, preferring to make his point, (as did Hale before him) by reference to a series of illustrations. However, it is submitted that, conceptually, objective connotations are present in the very description of provocation as "slight". When used in its adjectival sense, the word imports elements of comparison; provocation cannot be "slight" in a vacuum. It is true that the standard by which the gravity of an incident is measured need not, as a matter of logic, be the anticipated reaction of hypothetical ordinary men. But by the same token, it would be most unusual were the question to be judged solely in terms of the accused's reaction to the incident. If this were the case, it is difficult to see how provocation leading to a killing could ever be "slight" at all, since the defendant must have regarded it as sufficiently grave to kill in response to it. The only conclusion that can be reached is that Foster must have had

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70. See E.g. the confusion between the two evident in Foster's treatment of the time factor, when he says that "... in every other case of homicide upon provocation, how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder." Foster, 296.

71. Foster, 291.

some objective limits in contemplation.

Throughout the period under discussion, the question of sufficiency was generally treated as a question of law.[72] Occasionally, the issue was left to the jury, as E.g. in Wiggs.[73] There, however, the jury was expressly directed to consider "whether the negligence of the deceased was sufficient to excite the provocation of the master". This procedure did not invariably work to the disadvantage of the prisoner, and in Snow,[74] the judges ruled that a killing was manslaughter only after the jury had found the defendant guilty of murder. Similarly in Rankin,[75] and Ayes.[76] In the latter case, the finding is somewhat surprising, in view of the triviality of the provocation, (which was no more than the attempted theft, by the victim, of a fellow-prisoner's tobacco pouch), and the long and brutal retaliation of the offender.[77]

But despite this lenient application of the law in some cases, there are reminders of the objective limits in others. In Hazel,[78] counsel for the King explained a rule, stated by Kelyng, that certain conduct could not amount to provocation, on the basis that it was "a violent act beyond the proportion of the provocation". This is echoed by East, who writing in

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72. Taylor (1771) 5 Burr. 2793; 98 E.R. 466. Brown (1776) 1 Leach 148; 168 E.R. 177.

73. (1784) 1 Leach 378n.; 168 E.R. 290.

74. (1776) 1 Leach 151; 168 E.R. 178.

75. (1803) R. & R. 43; 168 E.R. 674.

76. (1810) R. & R. 166; 168 E.R. 741.

77. See the comments of Glanville Williams [1954] Crim. L.R. 740, 745.

78. (1785) 1 Leach 368; 168 E.R. 287.

1803, uses the words "if upon a reasonable provocation and without malice". According to Turner, East later "explains" these words in a way which is consistent with the former's view that reasonableness was purely an evidentiary criterion.

> "For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal an diabolical malignity than of human frailty." 79

It is difficult to see in what sense this may be regarded as proving Turner's point; at best, it seems to be ambiguous, and at worst, it may be interpreted as positively refuting it. What East is saying, it is contended, is that, even though the defendant may be acting in the heat of passion, if the incident which induced such a state was of a trivial nature, there is a legal fiction ("rather to be considered")[80] that he was acting out of malice and is guilty of murder.

It is perfectly true that, in the early years of the nineteenth century, the judges did develop the practice of leaving the question of provocation to the jury. But Turner's lengthy quotation from Thomas,[81] which he cites as authority for the proposition that "reasonableness" was only an evidentiary criterion,[82] proves no more than that the jury had to satisfy

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79. 1 East P.C. 234.

80. And see Foster's "is considered as flowing rather". Foster, 291.

81. Russell; 12th ed. 533. The same comments apply to his analysis of Hayward (1833) 6 C. & P. 157.

82. See f.n. 67 supra. Indeed in the case, Baron Parke himself appears to have decided the question of sufficiency when he said that "There is no doubt here, but that a violent assault was committed; but the question is, whether the blow given by the prisoner was produced by the passion of anger excited by that assault". ib; 819.

itself that the defendant was in fact acting in the heat of passion caused by a "violent assault". It by no means follows that the judges had relinquished their control over the question of sufficiency entirely. In Shaw,[83] decided only three years before Thomas, in which a sixteen year old boy had strangled another after a quarrel about money had developed into a fight, the jury was directed in the most uncompromising terms by Patteson J. that, even if the offender's story were true, the proper verdict was one of murder. And in Carroll,[84] the same point is made even more explicitly. The victim, a woman publican, refused to serve the offender, a soldier, because of something which he had said to her the previous evening, and asked him to leave. She was then knocked senseless and stabbed to death. Park J. ruled that

> "There is no doubt that the prisoner was in a great fury; but the question of law is, was there sufficient provocation to excite it? We are of opinion that there was not."

No real reason is advanced for this conclusion, beyond a recitation of the facts, but in its tenor, the decision is but a very short step away from the evolution of the reasonable man test. Furthermore, the judges showed a reluctance to extend the ambit of some of the well established rules. Thus in Pearson,[85] it was held that the rule that the sight of a spouse in adultery could constitute provocation was inapplicable unless there had been actual "occular inspection". And in Fisher,[86]

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83. (1834) 6 C. & P. 372.

84. (1835) 7 C. & P. 145.

85. (1835) 2 Lew. 216; 168 E.R. 1133.

86. (1837) 8 C. & P. 182.

it was held that the provocation was insufficient because of the lapse of time between the incident, (which was in this case the commission of an unnatural act with the accused's son), and the subsequent retaliation.

Even in those cases where the distinction between murder and manslaughter was left to the jury, it was not invariably freed to make the decision untrammelled by objective considerations as Turner asserts. In Langstaffe,[87] Hullock B. directed the jury in terms of "adequate provocation". In Hagen,[88] which was a prosecution for "cutting with intent", in which there was a conflict in the evidence as to the exact circumstances in which the incident occurred, the jury was told by Coltman J. that, if the prosecution's version was accepted,

> "if upon a provocation so slight as that, a party draws out a dangerous weapon and inflicts a wound with it, there is no doubt that if death ensues, it will amount to murder".

There is no evidence whatsoever, in the reported cases, that the judges left the "reasonable man" to the jury "as a guide".[89] Perhaps the closest that any judge actually comes to directing a jury in "reasonable man" terms is found in the words of

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87. (1827) 1 Lew. 162; 168 E.R. 998. A twelve year-old accused had been charged with manslaughter only, and the decision and words referred to must be regarded as obiter dicta only. However, Hullock B. felt that had the prosecution been brought for murder, it could have been sustained.

88. (1837) 8 C. & P. 167.

89. In the twelfth edition, (1964) Turner cites as authority the opinion of Lord Devlin in Lee Chun-Chuen [1963] A.C. 220. However, no authority is given for the same statement in the eleventh edition, and since Lord Devlin himself cites no authority, it is almost certain that there is none.

Coleridge J. in Kirkham,[90] which was decided in the same year as Thomas.[91] He told the jury that

> "although the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable controul [sic] over his passions".

It is submitted that any attempt to interpret these words as "a matter of evidence" is completely insupportable. It is equally difficult to see any difference in substance between Coleridge J.'s statement, and that for which Keating J. has subsequently been so greatly criticised, when he said that

> "The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion." 92

Whatever may subsequently have been made of this test, it is submitted that Keating J. did little if anything more than articulate the test towards which the Common Law had been groping virtually since the inception of the doctrine.

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90. (1837) 8 C. & P. 115.

91. (1837) 7 C. & P. 817.

92. Welsh (1869) 11 Cox C.C. 336, 338.

CHAPTER THREE

THE PRESENT LAW

A) Introduction

At the beginning of the evolution of the doctrine as an independent palliative, knowledge and foresight had not attained the predominant position as the pre-requisites of criminal responsibility which they now occupy, and it is no doubt for this reason that the unique character of the doctrine, in its departure from those now-familiar criteria, did not elicit any detailed apologia from any of the great institutional writers.[1] Indeed, once the doctrine had secured a place in the legal system, its rationale seems to have been taken almost for granted by both the Courts and the commentators, and it was not until the celebrated dictum of Viscount Simon in Holmes v. D.P.P.[2] that this aspect of the doctrine, and the relationship of self-control and its loss to the cognitive criteria of responsibility, were subjected to any really critical scrutiny.

1. Problems posed

It is arguable that, with the clarification of the cognitive tests, a concession to the loss of self-control has become increasingly anomalous; since the abolition of the death penalty, the "fixed and inevitable penalty" which acted as the

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1. See E.g. Blackstone's Commentaries, where the bland statement is made that "To kill a man upon sudden and violent resentment is less penal, than upon cool deliberate malice". Vol. IV. p.16.

2. [1946] A.C. 588, 589. For a fuller discussion of which see post p.45.

catalyst for its development in the first place,[3] much force has now departed from the rationale, and the doctrine, after some four hundred years of faithful service, has finally outlived its usefulness. At most the critics urge, all that is now required before we can dispense with the formal recognition of the doctrine altogether, is an amendment to the law to provide that there should no longer be any mandatory sentence, even of life imprisonment, for murder.[4]

Whatever the merits of such suggestions may be, they do serve to throw into relief some of the fundamental questions which the continued acceptance of provocation as formal mitigation poses for the concept of criminal responsibility. Foremost among these, although there may be others, are the following four:

(a) Why should the retention of self-control be regarded as a precondition of responsibility at all?

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3. But see Edwards; "Provocation and the Reasonable Man" [1954] Crim. L.R. 898, who sets the law in perspective by pointing to the effect which non-legal provocation had in the Home Secretary's decision as to a recommendation as to the granting of a commutation.

4. There is a suggestion to this effect in Cross; "The Mental Element in Crime" (1967) 83 L.Q.R. 215, 227. And see Samuels; "Excusable Loss of Self-Control in Homicide" (1971) 34 M.L.R. 163. Such proposals would, obviously enough, have wide ranging repercussions in other areas of the law relating to homicide, which cannot be dealt with in this survey.

It is probable that capital punishment will never again be exacted as the penalty for murder in New Zealand, although such predictions cannot be made with certainty. Originally abolished by the Labour Party in 1941, it was reinstated by the National Party in 1950 (Capital Punishment Act) only to be once more abolished, after considerable debate, by the present Crimes Act 1961, with the important difference that this time, it was the National Party which was in power.

(b) Why should its loss mitigate, rather than excuse completely?

(c) For what reason does the law require the reactions of the offender to be assessed in terms of what the hypothetical "ordinary" or "reasonable" man would have done in the same circumstances?

(d) To what extent should the operation of the doctrine rely on the intention of the victim to rile the accused?

No specific attempt will be made to present answers to these questions but it is in their light that the state of the present law, and the premises and assumptions upon which it is based, will be explored in the present chapter.

2. Brief Statement of Present Law

From the outset, the law has evinced a tendency to crystallise into fairly specific rules as to the sort of incident which may or may not amount to provocation. As recently as 1954, Glanville Williams was able to assert that "the class of provocative acts is fixed by law".[5] Even after the enunciation of the "reasonable man" test in Welsh,[6] which provided an over riding standard against which the provocative tendencies of any given incident could be measured, the Common Law experienced considerable difficulty in avoiding this unfortunate tendency, and in applying principles rather than all or nothing rules.[7] To a large extent, although not

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5. Williams; "Provocation and the Reasonable Man" [1954] Crim. L.R. 740, 742.

6. (1869) 11 Cox C.C. 336.

7. E.g. The rule that the sight of one's de facto wife or fiancee in "adultery" could not amount to provocation, despite the effect which this might have on the average person. See post p.135.

entirely, this difficulty was avoided in New Zealand by the statement of general principles in the Crimes Acts, which enabled each case to be determined by the jury as it arose, on its individual merits. In broad terms, the present Act provides that a killing which would otherwise be murder is to be regarded as manslaughter only, if it was precipitated by an incident which caused the accused to lose his self-control in circumstances in which an ordinary man might be expected to have reacted in the same way. To complete the picture it should also be pointed out that a provocative incident is a proper consideration to be taken into account for sentencing purposes in cases of offences (presumably of violence against the person) not amounting to homicide.[8]

B) Subjective Requirements; Actual Loss of Self-Control

At the heart of the doctrine is the rule that the provocative incident must have been such that

S.169 (2) (b) "It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide".

Thus it will not avail the accused to show, without more, that he discovered his wife in the act of adultery, was attacked,

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8. O'Connell (1909) 2 Cr.App.R. 11, and Cunningham [1958] 1 Q.B. 188, and the statement to this effect in Holmes [1946] A.C. 588, 601. See Bruzas [1972] Crim. L.R. 367. There is an unresolved dispute in New Zealand as to whether provocation may be formally pleaded in the case of attempted murder. See Smith [1964] N.Z.L.R. 834. Per contra Laga [1969] N.Z.L.R. 417. It is probable that the better view is that the plea is restricted to its mitigating role in this case too. See Adams; "Criminal Law and Practice in New Zealand" 2nd ed. p.339. For fuller discussions see Trebilcock; "Scope of the Defence of Provocation in N.Z. Law" (1963) N.Z.L.J. 619 and Brown; "Murderous Intent and the Lesser Offences" (1965) N.Z.L.J. 537. An analysis of the issues involved is outside the scope of this survey.

or made the object of vile or obscene remarks;[9] he must also be able to show that he actually lost his self-control.

1. The Concept of Self-Control

Whilst it is an easy enough matter to state what is required, the real meaning of "self-control" is somewhat more elusive. As is the case with many of the terms which the law utilises, the concept has always been regarded as self-explanatory, and the law has generally been content to say what is involved in its absence, rather than its presence.[10] Underlying the use of the phrase is the idea that a person does not, as a result of emotion (usually anger),[11] think in a rational way about his behaviour and its consequences, a process usually described in such stock terms as

> "a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind". 12

As will be shown, it is extremely difficult to ascribe any more positive, precise meaning to the phrase. And it is submitted

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9. This is also the Common Law rule; Smith and Hogan 207 2nd ed.

10. The expression is relatively new in the law, and appears first in the Reports in Kirkham (1837) 8 C. & P. 115. One probable reason for the lack of definition is the existence of the objective condition. Recently there have been suggestions that there is some physiological foundation to what the Courts have been content to regard as a matter of common sense. See Brett; "The Physiology of Provocation", [1970] Crim. L.R. 634. Without in any way deprecating the value of such research, it is submitted that it will not have a great deal of impact on the law, because of the way in which the concept of self-control is actually used by the law.

11. For suggestions that emotions other than anger may be material, see Packett (1937) 58 C.L.R. 190, 217, per Dixon J. Rolle [1965] 3 All E.R. 582, in which "terror" is referred to as a possibility.

12. Duffy [1949] 1 All E.R. 932, per Devlin J.

that, until it is possible to establish rather more accurately both the meaning and function of a "loss of self-control", we are in no position to accede to the submission of such critics as Smith and Hogan, who argue that "the objective test should be abolished, and a purely subjective criterion applied".[13]

(a) Relationship with Intention and Malice

One celebrated attempt to explain the effect of a loss of self-control was essayed by Viscount Simon in Holmes v. D.P.P.[14] who said that

> "The whole doctrine of provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intent to kill or to inflict grievous bodily harm, is negatived."

An exception to this was to be found in the rule relating to adultery; only when one spouse found the other in flagrante delicto could the doctrine of provocation still succeed where the prosecution had established the intention to kill. This dictum was subjected to a barrage of criticism, and it is unnecessary here to undertake a detailed refutation of it.[15] Suffice it to say that none of the numerous attempts to reconcile the statement with the law as it had hitherto been understood was completely successful. Thus, it was suggested

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13. op.cit. 215. Since the Homicide Act, 1957 (U.K.) it is the law in England that a trial judge may withdraw the issue only where there is no evidence that the accused himself lost his self-control, but this has not so far prompted the Courts to say what the expression means.

14. [1946] A.C. 588, 598.

15. Landon (1949) 65 L.Q.R. 105. Edwards (1953) 69 L.Q.R. 549. J.V. Barry; "The Defence of Provocation" (1948-1950) Res Judicatae 129. Williams; "Provocation and the Reasonable Man" [1954] Crim. L.R. 740, 744. Royal Commission on Capital Punishment, Cmnd. 8932 of 1953, para 136. The best documented refutation, from an historical point of view, is written by Turner in Russell, Vol. 1, pp.520-526. 12th ed.

that when Viscount Simon used the word "malice", he was doing so in its old sense of a pre-conceived intention, and the dictum was then reduced to the comparatively trite and harmless proposition that provocation and the formation of a pre-conceived intention are in general incompatible.[16] Even this suggestion is not without its difficulties. To begin with, the element of preconception was introduced, not by the word "malice", but by the various qualifications appended to it such as "praecogitata", "prepense" or "aforethought". In addition, if the adultery rule really is exceptional, it must follow that the law will in certain circumstances allow the plea to succeed even where the intention was premeditated, and this is clearly not the law.

Despite these criticisms, Viscount Simon's remarks are not altogether without validity. In New Zealand, in order to establish that a killing is murder, the prosecution is required to show either that the accused meant to cause the death of the person killed, or that he meant to cause his victim some bodily harm, knowing that death was likely to ensue, and was reckless whether death ensued or not.[17] It is conceivable that a person could be so infuriated that, at the time when he performed the act causing death, he was unable to form the intention to kill. Or, it may be that his reaction was so instantaneous that he did not appreciate that his conduct was likely to cause death. This was the point made by Eveleigh J. in Bruzas,[18] in which, on a charge of attempted murder, he

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16. For a fuller exposition see, "Studies in Criminal Law". Morris and Howard, Chapter III.

17. See generally Sections 167 and 168 of the Crimes Act 1961.

18. [1972] Crim. L.R. 367.

ruled that

> "provocation is a factor to be taken into account with all the other evidence in deciding what the accused's actual intention was".

Only one, extremely unsatisfactory, case seems to have been decided on the point. In Philpot,[19] the offender killed his wife by strangulation in the course of an argument over who was to pay for the family Christmas tree. It appeared in evidence that the couple had hitherto lived in comparative harmony. The main defence was insanity, but counsel also addressed the jury on provocation. Nothing was said at all by the trial judge about the possibility of a manslaughter verdict being reached. It was found by the jury that the accused was not insane, but "he acted in a fit of temper without intending to kill her". Upon being pressed for an explanation of this, the foreman then said that "the jury are unanimously and emphatically of opinion that at the moment of the act the prisoner did not realise the consequences of what he was doing". The trial judge directed the jury to reconsider this verdict reminding them that a man is presumed to intend the consequences of his conduct, and the jury eventually returned a verdict of murder with a recommendation to mercy. In the Court of Criminal Appeal, it was argued that the first verdict was tantamount to one of manslaughter, and that there should have been some direction on the point. However, the Court ruled that the jury

> "must have meant that the failure to realise the consequences was due to the fit of temper. In the circumstances it was not a misdirection to tell the jury that a man is held to intend the consequences

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19. (1912) 7 Cr.App.R. 140.

of his act".

This decision was approved by the House of Lords in D.P.P. v. Smith,[20] and it is submitted that it must be considered to have been abrogated by Section 8 of the Criminal Justice Act, 1967.

Although the point has never arisen for consideration in New Zealand, it is submitted that, should it do so, the offender would be entitled to a verdict of manslaughter rather than murder simply because the Crown would have failed to prove all the elements of its case. In principle, such a result should also follow whether the objective limits of the defence of provocation are satisfied or not, and there would be no objection to the offender's alleging that he was abnormally short tempered, or was mentally deficient or weak minded. In practice, the offender's allegation that he did not know what he was doing is likely to founder on the scepticism of the jury, particularly where the killing is accomplished by the use of prolonged violence.

Be that as it may, actual loss of self-control will not normally negative the presence of the cognitive criteria which the law generally regards as essential for criminal responsibility. If anything, the provocative incident acts as an inspiration for the formation of the intention to kill. As a general rule, the criminal law will not concern itself with the reasons why the intention to perform an act constituting a criminal offence has been formed; such matters are consigned to the realms of motive, and are treated as

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20. [1961] A.C. 290.

irrelevant for the purposes of conviction. It is sufficient that the act in question is causally connected with the intention, and is the result of it.[21] It is submitted that the law relating to provocation is an exception to this general practice, and that the Courts in effect pursue the inquiry one step further backwards along the chain of causation. If the accused deliberately seeks the provocation, or if the provocative incident is one of which he is unaware at the time he does the act causing death,[22] it cannot be regarded as the true source of his intention. Actual loss of self-control is relevant because, in the heat of the moment, it means that the actor is less able to check the formation of the intent to kill. Indeed, it is little more than an alternative mode of expressing the idea that the offender himself experienced difficulty in checking his impulsive reaction to what was said or done to him.

If Viscount Simon's exposition of the law were to be regarded as correct, and the inquiry were to be directed solely at ascertaining whether the intent to kill had been formed, the doctrine in its original form would have been completely undermined. However, the law governing the point was set aright by the Privy Council in Att. Gen. of Ceylon v. K.D.J. Perera,[23] where, without actually adverting to the Holmes dictum, the Privy Council stated that the law in England was that

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21. See Marston; "Contemporaneity of Act and Intention in Crimes" (1970) 86 L.Q.R. 208.

22. Section 169 (5) Crimes Act, 1961. And see Foster, 315.

23. [1953] A.C. 200, 206 per Lord Goddard C.J. And see now Lee Chun-Chuen [1963] A.C. 200. Parker [1964] A.C. 1369, 1381. Martindale [1966] 1 W.L.R. 1564.

> "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation".

On only one occasion have the New Zealand Courts expressly considered the Holmes dictum - in the Full Court on an appeal from the High Court of the Cook Islands.[24] There, however, the Court was dealing with the Cook Islands Act, 1915, which contained no express provision relating to the defence. Acting on the assumption that there might nevertheless be a Common Law defence of provocation, the Court cited Viscount Simon's dictum with approval and ruled that the evidence was quite incompatible with provocation as known to English law, and the appeal was dismissed. Nor did the Privy Council see fit to interfere on a further appeal, even though the appellants were under sentence of death, and delivered its advice that the appeal should be dismissed without comment. It is submitted that the decision cannot be taken as representing New Zealand law on the point. Although there is no authority directly in point, the Court of Appeal has on a number of occasions directed a new trial where it is clear that the intention to kill had been established,[25] and it is significant that the Court has never attempted to buttress a verdict of murder rather than manslaughter on the ground that an intention to kill has been proved.

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24. Latoatama, Folitolu, Tamaeli v. Williams [1954] N.Z.L.R. 594. The Privy Council delivered its opinion some eighteen months after the decision in Perera, and must have decided that, notwithstanding the error, there was no merit in the appeal.

25. Kahu [1947] N.Z.L.R. 368. Lewis (1962) unreported. C.A. 92/62. Dougherty [1966] N.Z.L.R. 890.

(b) A Comparison With Irresistible Impulse

The law's insistence that, before the plea can operate, the offender should be "not master of his mind"[26] has prompted one learned commentator to treat provocation and irresistible impulse as though they were synonymous.[27] For two reasons, it is submitted, this comparison is unfortunate and misleading. To begin with, the term "irresistible impulse" is usually associated with, and the product of, some form of mental disorder, as opposed to the natural anger which a provocative incident may inspire. One constant criticism of the M'Naghten rules is that they do not cater for conative deficiencies of this sort. However, the introduction of that defence is one which the law has steadfastly resisted.[28] As Glanville Williams has suggested, it may well be that persons who over-react to some trivial provocation are in some way mentally unbalanced, and there is force in his comment that, if so, their needs are not then reduced punishment,

> "but the curative and preventive detention supplied by the law of insanity". 29

The second objection is rather more conceptual. Even where the plea is successful, the offender is convicted of

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26. Duffy [1949] 1 All E.R. 932.

27. Turner in "Kenny's Outlines of Criminal Law", 19th ed. p.171. "For many centuries past the common law has recognised one situation in which criminal liability may be reduced, although not entirely removed, if it be proved that the misdeed was done under the influence of an irresistible impulse." This sole case is that of provocation.

28. Burr [1969] N.Z.L.R. 736.

29. [1954] Crim. L.R. 740, 743. To some extent, the problem has been alleviated in England by the introduction of the defence of diminished responsibility by Section 2 of the Homicide Act 1957.

manslaughter and liable to life imprisonment.[30] If the impulse was genuinely irresistible, and such that an ordinary person would not have been able to resist it either, there would seem to be little justification for imposing any punishment at all. Surely the assumption underlying the offence of voluntary manslaughter is that the impulse could have been resisted, but in the circumstances the offender experienced understandable difficulty in doing so, and is therefore less culpable.

(c) Linguistic Difficulties

Recently, there has been some speculation and disagreement as to what actually takes place when a person reacts to a provocative incident, which casts some light on what is meant when we say of a person that he has lost his self-control. One view is that taken by North J. in McGregor,[31] who said that

> "The deprivation of self-control implies a sudden transition to a state, necessarily temporary, during which the power of self-control is absent".

A similar view is held by those who would argue that the source of the provocation should be regarded as irrelevant, and that there should be no requirement that the retaliation should be directed at the person who actually gives the provocation.[32] According to these critics, once the offender has in fact lost his self-control, the insistence on such restrictions is both unrealistic and illogical, in that they require control of a person who has by definition "lost" that power. On the same basis, Counsel in Phillips[33] launched an attack on the so-called

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30. See Section 177 of the Crimes Act, 1961.

31. [1962] N.Z.L.R. 1069, 1078.

32. See E.g. O'Regan; "Indirect Provocation and Misdirected Retaliation" [1968] Crim. L.R. 319. And see post p.141.

33. [1969] 2 A.C. 130, 137; 2 W.L.R. 581, 585. per Lord Diplock.

reasonable retaliation rule. The Privy Council dissented from the view taken in McGregor, pointing out that Counsel's submissions were

> "based on the premise that loss of self-control is not a matter of degree but is absolute; there is no intermediate category between icy detachment and going beserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships' view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon."

It is submitted that the Judicial Committee's description of the argument as being "purely semantic" is an apposite one, and that at least some of the difficulties which pervade this area of the law can be traced to linguistic ambiguities. Frequently, the mistaken assumption is made that the words "self-control" must have reference to, or "stand for" some entity which is in some way possessed and capable of being lost. Consequently, when we say that a person has "lost his self-control", we are making a statement of fact which is of the same logical character as the statement that a person has lost his umbrella. This assumption distorts the various complex functions which the words actually perform as an integral part of the law of provocation.[34]

In fact, the predominant function of the sentence "he has lost his self-control" is usually descriptive of the actor's conduct at the relevant time; the person who has observed the behaviour of the offender (not infrequently it will be the

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34. The locus classicus warning of the dangers of building such "theory on the back of definition" is the article by Hart; "Definition and Theory in Jurisprudence" (1954) 70 L.Q.R. 37.

offender himself) draws inferences from such phenomena as changes in the actor's colouring, what he says, and indeed what he does, and concludes that the actor did not resist the impulse to react to antagonism. In addition, the observer's statement performs a number of subsidiary functions. Inferences of a comparative nature may be drawn. Thus he may say of a person who swears vehemently in response to some trifling vexation that the actor "lost his self-control", even though it is obvious from the context of his remarks that there was no possibility of the actor's killing anyone. To some extent then, our usage varies according to the degree of provocation offered, the nature of the retaliation to it, and the context in which the description is made. In this sense, there are degrees of provocation and loss of self-control, and it is only when the statement is taken out of context and at face value that the observer appears to be making a statement of fact.

Sometimes too, a dispositional judgment is being made. I.e. the speaker is inferentially passing comment as to the degree of control which might have been expected of the actor in the circumstances, according to his prediction as to what might be expected to happen when a person is confronted by the particular situation in which the actor was placed. Thus, we might properly say of a man who swore even vehemently, that he "displayed self-control" if we knew that he had just discovered his wife committing adultery. Our usage in such a case is qualified by the fact that we might have expected his reaction to have been rather more vigorous. This prediction may be made either according to what we know about the actor

himself, or according to some standard of a more abstract and hypothetical sort. It may well be that, because of this consideration, it was inevitable that the standard should have become, in law, the ubiquitous reasonable man, if only because of the evidentiary difficulties involved in enquiring into the past behaviour patterns of the offender himself. What is important in all this, it is submitted, is that in none of these cases does the statement that a person has "lost his self-control" act as a statement of fact which is in any way capable of empirical verification. Even accepting that an offender is telling the truth when he makes such a statement about his own behaviour, there is nothing "illogical" in requiring the retaliation to be reasonable or well-directed.[35]

In addition, the concept of self-control performs an equally important, if rather different function. That is, it serves as a link in the chain of causation between what was done to the offender, and what he himself did in response,[36] and is used in this sense in the Crimes Act 1961 itself,[37] which speaks of the offender being "thereby induced ... to commit the act of homicide". Arguably, this function is one reason in itself why the law has not found it necessary to enquire too deeply into the meaning of the "loss of self-

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35. Which is, of course, an entirely different thing from saying that the requirement is nevertheless "unrealistic". And see post p. 100.

36. In the earlier law, this same function was performed by the "heat of passion". See esp. Thomas (1837) 7 C. & P. 817, in which the direction of Baron Parke is aimed at ensuring that the jury satisfy themselves that this requirement is established by the evidence. And See Williams [1954] Crim. L.R. 740, 751.

37. For the full text of the relevant Section (169 2(b)) see supra p. 43.

control". If it is clear in any individual case, that the offender was caused to behave as he did by what was done or said to him, then it may safely be assumed that he has "actually lost his self-control". This much, at least, would remain if the objective test were to be abandoned. But by the same token, the reasonable man test does provide a useful evidentiary yardstick to assist the tribunal of fact in its task of ascertaining the true cause of the formation of the intention to kill.[38]

Several further comments about the way in which the concept is used may be made. The Crimes Act 1961 refers to the "power of self-control".[39] Although the point has never been taken in New Zealand,[40] this phraseology is open to the same objections as were made in the context of irresistible impulse. If the offender's powers of self-control are absent in circumstances in which an ordinary man would have been affected in the same way, then he is being punished for something which it is by definition outside his power to control. The difficulty here is reminiscent of that which arose in connection with the defence of intoxication. In D.P.P. v. Beard,[41] the House of Lords spoke of taking into account incapacity to form an intent, along with other factors, in

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38. This is Turner's explanation of the evolution of the reasonable man test in the first place. As to which see supra p. 33.

39. In Sections 169 (2) (a), and 169 (4).

40. No such objection could be taken in the U.K. because the Homicide Act 1957 is worded differently on this point, and, it is submitted, more felicitously.

41. [1920] A.C. 479.

ascertaining the state of the accused's mind. But as Lord Devlin has subsequently pointed out,[42] if the accused really is incapable of forming the intent, then he cannot possibly have formed it, and no other factors can possibly be of any relevance. Surely the true view in the case of provocation is that

> "if we punish at all we punish less, on the footing that, though the accused's capacity for self-control was not absent, its exercise was a matter of abnormal difficulty." 43

It is submitted that the Crimes Act must be interpreted in the light of these remarks. To hold otherwise would mean either that the defence would never succeed at all, or that, in punishing the offender even for manslaughter, the law is engaged in a useless exercise of retribution, or a morally unjustified exercise in general deterrence.

2. Evidentiary Difficulties

Before an offender is entitled to have a plea of provocation entertained by the tribunal, there must, as a matter of law, be evidence of provocation, including evidence that the accused has in fact lost his self-control.[44] For several reasons, one of which has already been touched upon,[45] this is the least formidable of the hurdles facing the offender, and the element of the defence which has caused the law the least difficulty. Two further probable reasons for this suggest themselves, the first of which being the existence of

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42. Broadhurst [1964] A.C. 441, 461.

43. H.L.A. Hart; "Negligence, Mens Rea, and Criminal Responsibility". In P. and R. 153.

44. Section 169(3) of the Crimes Act, 1961.

45. Supra p. 55.

the objective condition. If it is shown that the incident was such that any ordinary man might have been prompted by it to lose his self-control, then unless it can be shown that the offender was peculiarly sanguine, it is probable that he did so too. And if the ordinary man test cannot be satisfied, the defence cannot be relied on in any case. Another probable reason for this lack of difficulty is the very character of the self-control concept; it is incapable of proof or disproof as a matter of fact, because that is not one of the functions which the concept performs. At best, it is possible that onlookers may agree in their interpretations of the conduct of the offender as they saw it.

Throughout the criminal law, the state of a man's mind is evidenced by what he has done or said at the time when he did the act for which he is being tried. But as often as not, "proof" of the loss of self-control takes the form of direct evidence given either by the accused himself or by an onlooker.[46] With the possible exception of Hampton,[47] this has generally been held to suffice. In that case, the appellant, who had expressed a desire to marry the woman who subsequently became his victim, was seen with his hands clasped around her throat. The observer, a nine year old brother of the victim then ran upstairs, dressed, and on his return, saw the appellant, who had by this time moved the victim to another part of the room,

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46. Until the end of the nineteenth century, the accused was not permitted to give evidence on his own behalf. Criminal Code Act, 1893 (N.Z.) Section 398; Criminal Evidence Act, 1898 (U.K.) Section 1.

47. (1909) 2 Cr. App.R. 274. And cf. Fitzgibbons (1912) 7 Cr.App.R. 264.

still holding her by the throat. Hampton later made two statements, admitting the killing, but alleging that he was at the time angry because the woman had said that she would have nothing further to do with him. At the trial, he did not give evidence, but the defence put forward on his behalf was that, in his anger, he had used more force than was intended; in effect he pleaded that the killing was an accident. The trial Judge, Phillimore J. directed the jury that the case was one of murder or nothing, and the Court of Criminal Appeal refused to interfere, holding that

> "when certain facts are proved by the prosecution, and the prisoner wishes to have a certain view of those facts accepted, it is incumbent upon him to give evidence with regard to it".

Although this decision has never been expressly overruled, it has almost certainly been overtaken by subsequent cases. For reasons of tactics, an accused person may very often be reluctant to give the sort of direct evidence which Hampton would seem to demand. This is particularly the case where the allegedly provocative incident takes the form of an assault, or a general skirmish, and either self defence or accident are possible alternative verdicts. In such circumstances, the law will not now place the accused in a fatal dilemma by insisting upon direct evidence. Instead, it allows the facts to speak for themselves; what is required is a "credible narrative of events", which may come from the evidence of either the prosecution or the accused himself, from which the loss of self-control may be inferred. The law was formulated in this way in Lee Chun-Chuen,[48] and although

48. [1963] A.C. 220.

the Privy Council was addressing its remarks to "the three elements" of provocation, the actual reason for the decision was that, even if the accused's version of the fatal incident were to raise doubts in the mind of the jury, there could be no suggestion that the appellant had in fact satisfied the subjective requirements.

This decision was merely a synthesis of a number of earlier cases. In Hopper,[49] the main defence advanced was accident, and the accused actually stated in evidence that he was not angry at the time when the fatal incident occurred. No attempt is made in the judgment to distinguish Hampton; instead the Court adverted to several circumstances surrounding the killing as being potentially evidence of provocation. It then held that it is the duty of the Court, with the assistance of the jury, to arrive at as true a view of what actually occurred as was possible. As a result, the Court could and should disregard the accused's own version of the facts if, in the circumstances, he had some ulterior purpose in distorting them. It follows from this that the trial judge has a duty to seek the opinion of the jury on the question of manslaughter should such a verdict seem possible to him on the facts. This is the case even though the accused or his Counsel has expressly disclaimed reliance on the defence, or made no mention of it. Hopper has been followed in a number of subsequent cases,[50] in the most recent of which,[51] the Privy Council stated that

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49. [1915] 2 K.B. 431.

50. Kwaku Mensah [1946] A.C. 83. Bullard [1957] A.C. 635. Bharat [1959] A.C. 533. Porritt [1961] 1 W.L.R. 1372. It was also approved in Mancini [1942] A.C.1.

51. Rolle [1965] 1 W.L.R. 1341.

the accused had merely to show that there was a "possible inference from the facts that the offender momentarily lost the power of self-control".

Apart from Lee Chun-Chuen, the writer has been able to trace only one (incompletely reported) decision, Clark,[52] in which the issue of provocation was held to have been properly withdrawn from the jury on the grounds that there was no evidence of actual loss of self-control. Because of its novelty, the case merits consideration in some detail. Early on the day of the fatal incident, the offender's mistress had humiliated and taunted him by referring to her relationship with another man. The couple returned to his flat later in the day to collect her belongings. In the interval, the appellant had procured ammunition and a shot-gun, which he had sawn off. The Court of Appeal held that it would be unsafe to conclude that, when they actually arrived at the flat, the intention to kill had been formed. There was evidence that she then swore at him, and that, shortly before the fatal incident, the two had once again been quarrelling in the kitchen of the

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52. [1971] N.Z.L.R. 589. The case is reported on another point. Cf. Maloney (1861) 9 Cox C.C. 6. The defence advanced on behalf of the accused was that the victim had committed suicide. It was held that there was no evidence of provocation, but the Court is not specific as to what particular feature of the defence it considered to be absent, and the case is explicable on the basis that there was no evidence of a provocative incident. And see Simpson (1915) 84 L.J.K.B. 1893, which is also perhaps explicable on this basis, although the stated grounds for the decision were that the provocation did not move from the victim. King [1965] 1 Q.B. 433, 455 where it is stated that "The Court thinks that it is quite incredible that the jury would have given any serious consideration to the suggestion that he killed his own child by reason of loss of self-control induced by the stimulus of seeing the injury which the mother-in-law, according to him, had inflicted upon that same child". per Winn J.

flat. Evidence was given by an eye-witness that when the appellant first presented the rifle and pulled the trigger, the weapon did not discharge because the appellant had forgotten to load it. He then did so, fired a shot and rang the police. After a brief telephone conversation, he then returned to the room where the victim was lying, and realising that she was still alive, fired a second and fatal shot.

At the trial, Quilliam J. directed the jury on the basis that there was no provocative act after the appellant had acquired the rifle early in the afternoon. The Court of Appeal, although prepared to assume that the quarrel in the kitchen could have been provocative, considered that there was no real substance in Counsel's criticism of the direction on this point. Counsel had also urged that the case should be viewed as one similar to Porritt[53] and Parker,[54] in both of which the provocation extended over a period fo some time, and to which the killing could be regarded as a climax. Porritt was distinguished by the Court which, after reciting the facts, says that "nothing like that ... can be said in the present case". No attempt is made to distinguish Parker at all, although again the facts are fully recited. In the event, the Court ruled that

> "In our opinion then the lapse of time between the first ineffectual effort on the part of the appellant to shoot Ethel Kirk and the second shot which killed her shows only too plainly that even if it was possible, though improbable, that at the beginning of the incident he had lost his power of self-control, he had regained control when the act of killing occurred."

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53. [1961] 1 W.L.R. 1372.

54. [1964] A.C. 1369.

Earlier the Court had said that the time lapse was compelling evidence that the killing was "deliberate and premeditated", and made reference to the trial judge's ruling that there must be a "sudden and temporary loss of self-control" with evident approval.

It is submitted that the decision sets a rather unhappy precedent. To say of a person that he might have lost his self-control to the extent that he formed the intention to kill, and then that he definitely regained his composure within a space of three minutes, (at a time when he believed that he had just killed a person of whom he was admittedly extremely fond) is surely only one possible interpretation of what had actually occurred. But having regard to the slight burden on the offender,[55] and the inherently vague nature of the self-control concept, is it not at least "possible" that a jury would infer a loss of self-control?[56]

3. A Note on Factors to be Taken into Account

In practice, the variety of factors which the tribunal may take into account in deciding whether this subjective element of the defence has been satisfied overlap to a considerable extent with those by reference to which it forms its opinion on the question of sufficiency. Incidents which will move the offender to wrath will in general be a provocation to other, ordinary, men.[57] One of the difficulties encountered

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55. It need only be shown that there was a "possible inference". See supra p.61.

56. Although comparisons on the basis of facts may be invidious in this area of the law, it is instructive to compare the case of McPherson (1957) 41 Cr.App.R. 213. Post p. 86.

57. This generalisation is subject to exceptions which are considered post p. 121.

in ascertaining the state of the early law is the confusion, evident in both the cases themselves and the work of the commentators, between the way in which the offender himself reacted, and the way in which he ought to have behaved according to the ordinary canons of human behaviour. Because of this overlap, a more detailed examination is better postponed until the ordinary man test has been dealt with.

C) "Objective" Requirements; Ordinary Loss of Self-Control

1. Introduction

When New Zealand first codified its criminal law in 1893,[58] the "reasonable man" had become firmly entrenched as part of the Common Law. In the New Zealand law, he reappeared in the slightly different guise of the "ordinary man",[59] and it is as such that he takes his place in the modern provisions, which stipulate that

Section 169 (2) "Anything done or said may be provocation if -

> (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control."

This requirement, commonly described as the "objective condition",[60] has been strenuously criticised to the extent

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58. The Criminal Code Act, 1893.

59. No reasons are given for the change by the Commissioners in the Criminal Code Commission Report 1878. The Full Court of Victoria suggests why "ordinary" is preferable to "reasonable" in this context in Enright [1961] V.R. 663, 669, where it is said that the word "ordinary" "points to the fact that he is brought into the doctrine for the purpose of denying the benefits of it, not to all those who react unreasonably to provocation, but only to those whose reactions show a lack of self-control falling outside the ordinary or common range of human temperaments."

60. Smith and Hogan; 2nd ed. p.208.

that there have been numerous calls for its abolition.[61] Quite apart from the fact that this would leave actual loss of control and the causation test as the sole criteria for the application of the defence, (a prospect which, in view of what has already been considered cannot be faced with any degree of equanimity), such drastic proposals tend to overlook the function which the ordinary man test actually performs as part of the doctrine. Whilst it may readily be conceded that some aspects of the test give cause for disquiet when they are measured against the rationale of the doctrine, it can be shown that, properly understood and applied, the ordinary man test is not as "objective" as some of its critics would have us believe. If any change in this area of the law really is warranted, might it not be better to probe behind, and if necessary discard, the time-worn terminology of the Common Law, and recognise the test more explicitly for what it really is?

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61. Ibid., p.214. Turner, "Russell on Crime". 12th ed. 535. Evidence given to the English Royal Commission on Capital Punishment, Cmnd 8932, para 141. Brown; "The Ordinary Man in Provocation" (1964) 13 I.C.L.Q. 203, 228. Samuels; "Excusable Loss of Self-Control in Homicide" (1971) 34 M.L.R. 163. A New Zealand proposal for the abolition of the test was contained in the Crimes Bill, 1957, Clause 181 (2) of which provided that "Any wrongful act or course of conduct, or any insult, may be provocation if it was so likely to deprive the person charged of self-control that he should not be held fully responsible, and if it actually deprived him of self-control and induced him to commit the act of homicide". In a Report which Finlay J. prepared on the Bill, it is stated that this "substituted an objective test for the subjective standard which has always been the accepted test in both New Zealand and the United Kingdom". Quite apart from the confusion between "subjective" and "objective", it is not entirely clear that the draft proposal would have succeeded in achieving its object, because of the ambiguity in the phrase "likely to deprive the person charged". By what criteria is this likelihood to be assessed? Is it according to what we know about the accused himself, or according to the effect which the incident would have on other, ordinary, men?

2. Rationale

It has already been argued[62] that, underlying the concession to human frailty implicit in the doctrine is a crude socio-ethical judgment that a killing as the result of antagonism is less serious than a killing from motives such as greed or revenge, and does not deserve to be visited by the infliction of the ultimate penalty, which should be reserved for use in the most serious cases. It is a recognition that, for understandable if not acceptable reasons, self-restraint may on occasion fail. In this respect, the doctrine is a classic illustration of what H.L.A. Hart has referred to as the "grading function" of the doctrine of mens rea.

Such a rationale is, no doubt, a product of retributive thinking, and some commentators have attempted to explain the doctrine on other, more "acceptable" bases. In attempting to reconcile the doctrine with a utilitarian standpoint, Glanville Williams says that

> "The true view of provocation is that it is a concession to the 'frailty of human nature' in those exceptional cases where the legal prohibition fails of effect." 63

This concession must, however, be regarded as something of an anachronism since

> "there are in this orderly age hardly any circumstances in which it can be asserted that an ordinary man would kill another person merely out of passion". 64

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62. See Chapt. II. This assessment is described as "crude" because it does not take account of other killings which proceed from equally understandable motives. E.g. from necessity or under duress, which the law treats as murder.

63. [1954] Crim. L.R. 740, 742.

64. Ibid. One may be permitted to wonder whether there is anything peculiar to "this age" which makes it any more "orderly" than the age of a hundred years ago, when the test was first formulated.

To overcome this difficulty, Williams argued that there are "categories of provocation", such as serious blows, or the sight of one's spouse committing adultery, of which the reasonable man test is but a "misleading reformulation". When it is found that the conduct of the offender comes within the terms of one of these categories, there is no further rule that the blow or discovery is provocation only if an ordinary or reasonable man in the same circumstances would have killed. He reinforces this view by arguing that if the legal prohibition is not present to the mind of the offender at the time when he is committing the offence, when it would not be present to the mind of the ordinary man either, it is a "curious confession of failure" on the part of the law to suppose that an ordinary man will still commit it, and to punish him even for a lesser offence.

If this analysis were correct, provocation would be reduced to a series of rules, explicable perhaps in terms of their history, but lacking any basis in current social attitudes and values. More important is the consequence that the reasonable man has been reduced to a functionless nonentity. With respect, Williams over-emphasises the need for special deterrence. Even if it is true that under provocation, a person does not reflect on the punishment awaiting him, it does not follow that the prohibition fails of effect entirely. Nor does it follow that all justification for imposing punishment is absent, or even that, in punishing the provoked person, the law is engaging in an exercise in general deterrence. Futther, there need be nothing "absurd" in the statement that a reasonable or ordinary man may commit an offence punishable

by life imprisonment, as Williams asserts, if the ordinary man test is seen as a reformulation of the idea that society, through the law, demands certain standards of restraint from its members. If the offender fails to comply with these standards, when an ordinary man would have done so, and the offender himself could have done so, a refusal to allow him the benefit of the defence is not only not absurd, but ethically perfectly defensible.

No authority is needed for the proposition that, in the normal class of criminal case, the Common Law[65] requires proof of conduct on the part of the person whom it seeks to punish, coupled with certain mental attitudes towards that conduct. Until recently, it has been felt that, with occasional exceptions, the only culpable states of mind are intention and recklessness.[66] Both of these involve some measure of foresight and knowledge on the part of the actor, of the consequences and circumstances which constitute the actus reus of the crime with which he is charged. In general, these cognitive criteria have been regarded as the necessary and sufficient conditions of responsibility; necessary because, without knowledge and foresight, a person is unable to avoid bringing about the prohibited consequence, and sufficient because it has been assumed that that possession of knowledge in some way includes the ability to control.[67] Hence, it has

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65. And in New Zealand by virtue of Section 20 of the Crimes Act, 1961.

66. For a general discussion, see Smith and Hogan; 2nd ed. Ch. 5.

67. These assumptions have been the object of criticism by, inter alia Cross, who argues that greater emphasis should be placed on "the accused's control of the situation as distinct from his knowledge of relevant circumstances and foresight of relevant consequences". "The Mental Element in Crime" (1967) 83 L.Q.R. 215, 226.

been argued that there is no moral justification in punishing negligence, which is the state of mind of a person who does not advert to the consequences of his actions, and which is, therefore, beyond his control.[68]

Similar objections have been levelled at the reasonable man test in provocation. Thus, Turner asserts that

> "It conflicts with the original basic justification for the admission of the defence of provocation for any man, which was that it could not be expected that man should be born with impregnable powers of self-control (omnipotent 'nature' being responsible for this frailty) and that it would be morally wrong and cruel to punish a man for what he could not prevent himself from doing." 69

Recently, the view that it is morally objectionable to punish negligence has been subjected to the withering scrutiny of Hart,[70] who points out that the concept of negligence involves something more than the mere failure to advert; it includes also a standard of care, and is a failure to advert in circumstances in which the reasonable man would have adverted and complied with the standard demanded. Hart is not concerned with the more general question of why it is ever morally justifiable to punish at all, but only with the criteria according to which we select those whom we will punish and those whom we will not. The reason why intention and recklessness are chosen is that the person who does think about his conduct could have done otherwise. His conclusion is that a person is punished in the case of negligence for failing to

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68. Turner; "Mental Element in Crimes at Common Law" M.A.C.L. 195.

69. Russell, 12th ed. 535. And see Brown; "The Ordinary Man in Provocation" (1964) 13 I.C.L.Q. 203, 230.

70. "Negligence, Mens Rea and Criminal Responsibility". P. and R. 136.

advert when he could in fact have done so.

> "In some cases at least we may say 'he could have thought about what he was doing' with just as much rational confidence as one can say of any intentional wrongdoing 'he could have done otherwise'." 71

It is submitted that, with one or two minor modifications, this analysis is applicable with equal force in the context of provocation, which also involves assessing the conduct of the offender by reference to a standard. As was said by Lord Simonds L.C. in Bedder,[72] the purpose of the objective test

> "is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the 'reasonable' or the 'average' or the 'normal' man is invoked."

Hart then qualifies his general principle by pointing out that

> "What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids and a fair opportunity to exercise these capacities."

It has already been argued that, when an accused person pleads that he acted under the stress of a provocative incident, he is not saying that these capacities were entirely absent, but merely that their exercise was for him a matter of abnormal difficulty. If, as Turner asserts, it genuinely is the case that the offender "could not prevent himself" from doing what he did, why is he not absolved from responsibility altogether? And how does the addition of the reasonable man test make the imposition of punishment any more morally indefensible? Since a successful plea of provocation involves a finding that the offender lost his self-control in circumstances in which an

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71. Ibid., 152.

72. [1954] 1 W.L.R. 1119, 1123.

ordinary man might[73] be expected to have done so, should he not still be acquitted altogether? In either case he has shown, according to Turner, that he could not prevent himself from committing homicide.

There are, of course, some differences in the standard demanded in each case. In negligence, the standard is one of care, and in provocation, one of restraint. Further, compliance with the standard of care leads to a complete acquittal, whereas compliance with the standard of restraint is a mitigating factor only. In the former, it is accepted by the law that the accused could not have complied, whereas in the latter, the concession is only that the failure is understandable.

But the two do share a significant number of features in common, and in particular the justification that the failure to comply with a standard with which the person being held responsible is capable of complying is punishable because others placed in the same situation would not have acted as he did.

If this is the real function of the ordinary man test, the description of it as "objective" is somewhat misleading. That term is generally applied only where the question of responsibility is determined entirely independently of the accused himself. Since the doctrine of provocation does allow for the capacities of the accused to be taken into account, in the way which has been just outlined, insistence

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73. The word "might" is used, although in Nuttall [1956] Crim. L.R. 125, an appeal was taken on the grounds that the trial judge had used "would" rather than "might". This argument was dismissed on the grounds that the argument was "really verbal". There is no uniformity of usage throughout the cases.

on the objectivity of the test tends to divert our attention from the fact that, in the majority of cases, the standard is one with which the offender could have complied.

Two considerations arising from this rationale, which have serious repercussions in the application of the test, must however, be mentioned. To begin with, not all persons have an equal capacity to measure up to the standard which the law demands. Some have idiosyncracies which render them more susceptible or vulnerable to incidents which would leave others without those traits, ordinary men, completely unmoved. In addition, it would seem that temperaments differ, and that some persons are more easily moved to wrath than others. The inevitable clash with the ordinary man test to which these considerations give rise will be considered at greater length below.[74]

The other serious difficulty is that views as to the degree of restraint which the law should demand are bound to differ; as the Privy Council has recognised,[75] speculations as to what an ordinary man might have done, which form the basis of the test, are more accurately characterised as matters of opinion than as matters of fact. This introduces an element of uncertainty and flexibility into the application of the ordinary man standard.

3. Factors to be Taken Into Account

The range of incidents which prompt ordinary men to retaliate, and the factors which govern the ordinariness or

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74. Post p.121.

75. Phillips [1970] 2 A.C. And see Section 3 of the Homicide Act, 1957.

otherwise of their behaviour, once the path of retaliation has been embarked upon, are many and varied. For this reason alone, it is readily apparent why Lord Goddard C.J. should have said in McCarthy[76] that

> "No Court has ever given, nor do we think can ever give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the jury...."

But in every case in which the possibility of manslaughter by provocation arises, some considerations remain constant, and have been the subject of more particularised rules.

(a) Reasonable Relationship

One such, which has come into prominence in recent years, which is of particular importance where the alleged incident takes the form of an assault, is the degree of similarity between what was done to the offender and the way in which he behaved in response. The rule which has been formulated to govern the issue, and which is variously known as the reasonable relation, retaliation, or proportion rule, was succinctly stated in Mancini[77] by Viscount Simon, who said

> "the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter".

No other aspect of the defence of provocation has been subjected to as much critical scrutiny and discussion; the soundness of the rule has been assailed from such wideranging standpoints as its logic and its practicality, and doubts have also been cast on its heredity, and its precise status as part of the present law.

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76. [1954] 2 Q.B. 105.

77. [1942] A.C. 1, 9. Hereafter referred to as the "Mancini rule".

(i) The Rule Explained

Before dealing with these criticisms, it is necessary to state rather more explicitly precisely what Viscount Simon had in mind. An analysis of the cases shows that the reasonable relationship rule has manifested itself in two rather different ways. In Mancini, emphasis was placed on the nature of the weapon used by the offender, and it was held that

> "to retort in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger".

Quite apart from the fact that a weapon is as dangerous as its user intends it to be, a literal interpretation of this would seem to require that the person provoked should himself have been made the object of a near homicidal attack, before he is entitled to the benefit of the defence.[78] Reasonable proportion appears in a slightly different garb, also enunciated by Viscount Simon, in Holmes v. D.P.P.[79] There it was said that the evidence of provocation must have been such that the jury could form the view

> "that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death".

What seems to be required by this aspect of the rule is that, unless the offender has been subjected to particularly reprehensible antagonism, he should expend his fury in the course of the first blow or two, and is otherwise not entitled to the benefit of the defence. Both aspects of this merge in the Mancini Rule.

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78. See post p. 102 for further discussion.

79. [1946] A.C. 588, 597.

(ii) History

It seems to have been accepted by the Institutional writers that where a deadly weapon was made use of by the person provoked, the provocation must have been greater than where no weapon, or a weapon not likely to kill was used.[80] What does seem clear is that, if the rule existed at all, it was by no means rigidly applied, and the mere use of a deadly weapon did not, ipso facto, disqualify the defendant in either Taylor[81] or Snow,[82] although in neither case was the offender himself the object of an attack with anything more than fists.

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80. See E.G. Brown; "The Subjective Element in Provocation" (1959) 1 Malaya L.R. 288, 299. It is suggested with some diffidence that the authenticity of this supposed rule is not entirely above suspicion. In Welsh (1869) 11 Cox C.C. 336, W.F. Finlason Esq., the reporter states in a footnote that "It is laid down by all the authorities that the question is as to the amount of provocation, especially where a deadly weapon is used. 'If a man kill another suddenly, without any, or without considerable provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as might greatly have excited him, the killing is manslaughter only.'" (1 Hale 460; Fost 240) The writer has been unable to trace this passage in Hale's History of the Pleas of the Crown, ed. Emlyn, pub. E. Lynch 1778, which purports to be unedited, and in which the page numbers "correspond exactly with those of the Folio". Finlason also cites the following passage from Foster 292. "In considering, however, whether the killing upon provocation amounts to murder or manslaughter, the instrument wherewith the homicide were effected with a deadly weapon, the provocation must indeed have been great to extenuate the offence to manslaughter if with a weapon or other means not likely or intended to cause death, a less degree of provocation will suffice; in fact, the mode of resentment must be in a reasonable proportion to the provocation to reduce the offence to manslaughter." Again, the writer has been unable to trace this passage in Foster, 3rd ed. Dodson, either at the page cited or elsewhere. Interestingly, when Counsel in Noel [1960] N.Z.L.R. 212 suggested that the Mancini rule was not part of the common law before 1942, it was this footnote rather than the original text itself which the Court of Appeal relied on in refutation.

81. (1771) 5 Burr. 2793; 98 E.R. 466.

82. (1776) 1 Leach 151; 168 E.R. 178.

Further, what might actually constitute a "deadly weapon" for these purposes does not seem to have been particularly closely defined. In Rankin,[83] after a brawl in a tavern between soldiers, the prisoner went outside and procured a pitchfork, and the judges held that the case was manslaughter only. By contrast, in Thorpe,[84] in which the prisoner had been "fighting up and down" with his victim, the jury was told by Bayley J. that

> "The foot is an instrument likely to produce death. If death happens in a fight of that description, it is murder and not manslaughter."

One explanation of the effect and purport of the rule was given by Nares J. in Wiggs,[85] who told the jury that it was to consider

> "whether the stake which has thus ultimately deprived the boy of existence, and which lying on the ground was the first thing the prisoner saw in his heat of passion, is, or is not, under such circumstances and in such a situation an improper instrument".

There are a number of other cases which cast doubts on the proposition that it was necessary that the offender should have observed some proportional limits in his choice of weapon. In Whitely,[86] it was considered that if a deadly weapon were drawn in the heat of blood after an exchange of blows, the verdict would be manslaughter only. As a corollary, it was decided in Smith,[87] that if the person had entered the fight

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83. (1803) R. & R. 43; 168 E.R. 674.

84. (1829) 1 Lew. 171; 168 E.R. 1001.

85. (1776) 1 Leach 378.

86. (1829) 1 Lew. 173; 168 E.R. 1002.

87. (1837) 8 C. & P. 160.

with the purpose of using the weapon all along, the verdict would be murder. The same would be true if a person engaged in a fight were to run away with the express purpose of obtaining a knife, but if his thoughts were solely to protect himself, the verdict could still be manslaughter.[88] And in Lynch,[89] it was considered material that the knife which the offender had used was one which he was accustomed to carry about with him. It is submitted that the effect of these decisions, and the state of the law was aptly summarised by Park B. in Thomas,[90] when he said that

> "If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation."

This line of authority shows that no particular significance was attached to the nature of the weapon as such. What it does show is that stress was placed on the circumstances in which the weapon came to be acquired and used. If the offender showed "thought, contrivance and design"[91] in his mode of possessing himself of the weapon, he was not entitled to the benefit of the defence. This qualification is capable of explanation on the basis that the offender was not then acting in the heat of passion at all. But it is equally consistent with an assumption, (admittedly inarticulate), that no ordinary person would have behaved as the offender

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88. Kessal (1824) 1 C. & P. 437.

89. (1832) 5 C. & P. 324.

90. (1837) 7 C. & P. 817.

91. Hayward (1833) 6 C. & P. 157.

did had he had time and opportunity to reflect on his conduct.

At the same time, it must be admitted that traces of the purported rule appeared on occasion. In Langstaffe,[92] in which the twelve year old defendant had been charged with manslaughter, Hullock B. stated quite uncompromisingly that

> "If without adequate provocation, a person strikes another with a deadly weapon, likely to occasion death, although he had no previous malice against the party, yet he is to be presumed to have had such malice at the moment from the circumstances, and he is guilty of murder."

This sentiment was reiterated, (again obiter) in Hagen,[93] in which the defendant, who had been requested by his victim, a policeman, to refrain from playing his bagpipes in the street at 11.30 p.m., alleged that he had been first assaulted by the victim. Coltman J. told the jury that if the assault had been no more than laying a hand on the offender "to give effect to his remonstrance", the case would be murder, because the provocation was slight, and the weapon used, a razor, dangerous. Apart from a reference to the dangerous weapon rule in Sherwood,[94] in which the jury was told that not every provocative blow would reduce murder to manslaughter particularly where "the prisoner appears to have resented a blow by using a weapon calculated to cause death", and the footnote in Welsh,[95] there seems to have been no further reference to it, even in cases in which one might have

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92. (1827) 1 Lew. 162; 168 E.R. 998.

93. (1837) 8 C. & P. 167.

94. (1844) 1 C. & K. 556; 174 E.R. 936.

95. See supra n.80.

expected it,[96] until its resurrection in Mancini.

From time to time, the law has also been troubled by those cases in which the retaliation takes a particularly brutal form. Both Hale,[97] and Hawkins,[98] explain the finding of Holloway,[99] on the basis that the killing was an act of deliberate cruelty. Foster, in dealing at some length with three cases[100] in which the provocative incident could not have been regarded as particularly provocative, both criticises them on the basis of the proportion rule, and brings to light facts which do not appear in the Reports themselves which show that the incidents were more provocative than they might otherwise appear to have been. East stated that[101]

> "Where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner of the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty."

There is, however, no evidence that this opinion found any favour with the judges, at least where it was clear that the offender was acting in response to a legally provocative incident such as an assault, and in the heat of passion.

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96. See e.g. Hall (1928) 21 Cr.App.R. 48, and Cobbett (1940) 28 Cr.App.R. 11, in both of which the verdict of murder was reduced even though the retaliation was with a knife.

97. 1 Hale P.C. 454.

98. 1 Hawkins P.C. c.31, s.39. And see Fost. 292.

99. (1628) Cro. Car. 131; 79 E.R. 715.

100. Fost. 292-295. Stedman, Tranter and Reason and Rowyley.

101. 1 East P.C. 234.

Certainly in the case of Ayes,[102] in which the heavily built offender hit his much smaller opponent with a fist several times, pushed him to the ground and then "gave him two or three great stamps in the stomach and belly", no mention is made of the necessity for proportion, and the only provocation which could have been relied on was the conduct of the victim in trying to defend himself, after he had been attacked for stealing a fellow prisoner's tobacco pouch. The case most frequently cited in support of the existence of a proportion rule in this sense before Mancini, is the case of Thomas.[103] There, it is true, Baron Parke said

> "suppose for instance, a blow were given and the party struck beat the other's head to pieces by continued, cruel and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder."

At first sight, that certainly seems to be impressive and cogent enough authority. But apart from the fact that the indictment in this case was not for murder, but malicious stabbing, the import of this statement can only be appreciated when it is read in context. The offender, who was drunk, had been seen in a tavern shortly before the incident marching up and down with an opened sword stick in his hand, and was heard to say, "If any man strikes me, I will make him repent it", a threat which he carried out shortly afterwards when his victim assaulted him. The issue before the jury was whether this statement was merely an idle threat or whether Thomas really had determined beforehand to strike with his sword

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102. (1810) R. & R. 166; 168 E.R. 741.

103. (1837) 7 C. & P. 817, 819. See E.g. McCarthy [1954] 2 Q.B. 105, 112. Noel [1960] N.Z.L.R. 212, 219.

stick any one who assaulted him; whether in other words there was any causal connection between the assault made upon him, and the retaliation. In these particular circumstances, it is submitted, the way in which the offender avenged the blow, including the number of blows he administered, would be some evidence of what he had determined beforehand. It is a long step to say that the same consideration will be of relevance in every future case. Further, as has already been argued,[104] Baron Parke had already decided for himself that the assault, since it was violent, would have been sufficient to provoke the offender; the only question was whether it really had done so, and it is contended that Baron Parke meant nothing further by his remarks.

Even in the very year in which Mancini was decided, it is by no means clear that anything in the nature of the proportion rule existed as part of the law. In Prince,[105] the provocative incident consisted of indecent suggestions and actions, and, according to the All England Report, but not the Criminal Appeal Report, a glancing blow with an axe. In retaliation, Prince struck his victim at least ten times with a fireman's axe, four of which would have proved fatal. The Court of Criminal Appeal substituted a verdict of manslaughter on the grounds that the jury had been misdirected as to the burden of proof. No mention was made of the proportion

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104. Supra p. 36 fn.82.

105. (1941) 28 Cr.App.R. 60; 3 All E.R. 37. See the note by P.A. Landon (1943) 59 L.Q.R. 107, where it is stated that Tucker J., a member of the Court of Criminal Appeal "explained ... that the indecent words in that case were followed by an indecent assault". The occasion of this explanation is not specified.

rule, whereas it is difficult to see how, had the rule been part of the law, it could be said that there was any evidence of provocation at all.

(iii) Present Status

Whatever doubts there may be about the historical credentials of the Mancini rule, it has since become the source of speculation, comment and disagreement. One complication is that the status of the rule is, in part, a product of the respective functions of judge and jury. Essentially, the problem is whether the rule is an element of the defence in addition to the ordinary man test, or whether it is simply a factor to be taken into account by the tribunal in deciding how an ordinary man might have behaved. If the former is the case, then the Mancini rule would seem to have added a new element altogether. It would then be open to the trial judge to either apply the test himself and rule that there was no evidence of provocation, or if he did decide to leave the issue, to direct the jury that they must decide for themselves whether some degree of reasonable relationship existed. In these senses, the rule may be said to be one of law. If, however, the latter more accurately describes the status of the rule, the judge could again decide for himself whether there was evidence of provocation,[106] but he would have to decide the issue as part of a more general question of how an ordinary man might have been affected by what was done or said to the offender. He would then be required to direct the jury

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106. Unless enjoined by Statute not to do so, as is the case in England. Section 3 of the Homicide Act, 1957.

in the same way.

It is suggested that these are the logically consistent possibilities inherent in the problem if an attempt is to be made to force the rule into a fact/law dichotomy. Not surprisingly, in view of the complicated nature of the issues involved, the rule has tended to defy any such attempts at classification, and has hovered instead somewhere between the two stools. Further, since Mancini was decided, legislation impinging on the question has been passed both in England and New Zealand, and the respective laws may not be identical.

Immediately after the decision in Mancini, the Courts tended to treat the requirement as an independent one. In Gauthier,[107] the trial judge refused to permit counsel to address the jury on provocation, and the Court of Criminal Appeal agreed that he had taken the correct course, saying that

> "the mode of resentment must bear some relation to the alleged provocation. A Bren gun which fires bullets in quick succession is one thing, but a woman showing preference for a particular lover is another".

In Att. Gen. for Ceylon v. Perera,[108] the trial judge permitted the issue to go to the jury, but directed it that the plea could not succeed unless the action taken by the offender was "reasonably commensurate" with the degree of provocation offered to him. The Court of Criminal Appeal of Ceylon set aside the conviction, but this was restored by the Privy Council. It was held that the Mancini rule applied in Ceylon, on the basis of what can only be described as a non-sequitur. In the section of the Code with which the Judicial Committee was concerned,[109] the words "grave" and

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107. (1943) 29 Cr.App.R. 113, 119.
108. [1953] A.C. 200, 206.
109. Section 294 of the Ceylon Penal Code.

"sudden" were used. Lord Goddard expressed the opinion, it is submitted correctly, that such words are "relative". He then says, however, that the standard by which the relativity is to be measured is the nature of the provocative act. Seriousness

> "must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, otherwise some quite minor and trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation, and provocation which may cause the sufferer to lose a degree of control, but will not excuse the use of a deadly weapon."

But if the offender did lose his self-control and kill, surely he at least regarded the provocation was "grave". If a man were, quite unexpectedly, to discover his wife committing adultery, and to react in the most phlegmatic of ways, could we not still properly say that the provocation was "grave"? Surely the standard which the law has chosen, the anticipated reaction of a hypothetical ordinary man is not only a "possible" test of gravity, but a perfectly adequate one. If the issue were to be judged from the way in which the offender reacted, would it not always be possible to say that the provocation given was "grave".

Lord Goddard's use of the word "justify" suggests, it is contended, that he considered Mancini to have added a further element to the defence.[110] A similar approach to the rule is evident in McCarthy.[111] In the course of argument he

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110. cf. contra in Noel [1960] N.Z.L.R. 212, 219.

111. [1954] 2 Q.B. 105. And see Southgate [1963] 1 W.L.R. 809, in which the trial judge assented to counsel's submission that the use of the word "justify" was apt to be misleading.

posed the following question:

> "Assuming that there was provocation which could cause a man to lose his self-control, how can that degree of violence be justified even if he were drunk. Have you considered Mancini?"

The facts of McCarthy bear a striking resemblance to those of Prince.[112] The appellant claimed that he had been the object of indecent suggestions and a sodomitical attack. He then beat his victim's head on the ground, inflicting four fractures of the skull. Provocation was left to the jury by the trial judge, but with the direction that it was a question for them to decide whether a reasonable man could have been driven to the degree, method and continuance of violence displayed by the offender. This direction was upheld. It was considered that the alleged provocation would have extenuated

> "a blow, perhaps more than one, it could not have justified the infliction of such injuries.... If a man who is provoked retaliates with a blow from his fist on another grown man a jury may well consider, and probably would, that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation might well merit a blow with a fist. It would be quite another thing, however, if the person provoked not only struck the man, but continued to rain blows upon or to beat his head on the ground."

Finally, Lord Goddard repeats the sentiment which he expressed in Att.-Gen for Ceylon v. Perera, that what would govern the opinion of the jury as to what constitutes the reaction of a reasonable man

> "would be the nature of the retaliation used by the provoked person".

It is submitted that this case clearly elevates the proportion test into something more than a mere factor to be taken into account by the tribunal. True, Lord Goddard does

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112. (1941) 28 Cr.App.R. 60; 3 All E.R. 37.

rationalise the test in reasonable man terms, but because he says that the reasonable man always reacts with proportion, a view with which others disagree,[113] he is in effect stating a proposition of law.

This seems to have been how the test was subsequently understood. In Bedder,[114] the jury was told by the trial judge that

> "The provocation must be such as would reasonably justify the violence used, the use of a knife".

However, in Chan Kau, 115 the Privy Council quashed a conviction of murder after the trial judge had ruled that the jury could not find a verdict of manslaughter upon provocation, and refrained from commenting on Crown Counsel's argument that the requirements of the reasonable retaliation rule had not been satisfied. More surprisingly, perhaps, in McPherson,[116] a conviction of murder was upset by the Court of Criminal Appeal on the basis of a misdirection as to the burden of proof. On the day before the fatal incident, the offender had bought a shot-gun and sawn it off. As the victim cycled past him, hurling abuse and threats, he was shot four times, an action which required the offender to break and re-load the weapon. Lord Goddard C.J. said that, had the trial judge refused to put the issue of provocation at all, the Court would not have

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113. See E.g. the Supreme Court of Hong Kong in Ng Yiu-nam [1963] Crim.L.R. 850 where the proposition is described as "contrary to common sense".

114. [1954] 1 W.L.R. 1119.

115. [1955] A.C. 206.

116. (1957) 41 Cr.App.R. 213. Cf. Fantle [1959] Crim. L.R. 584, where the absence of any reference to the Mancini rule is commented upon, and Elliot, "The Interpretation of the Homicide Act, 1957". [1960] Crim. L.R. 5, 11.

interfered, but he considered that, since the trial judge had adopted that course, he was obliged to put the issue fairly before the jury, and the verdict was "reluctantly" set aside.

With the passage of the Homicide Act, 1957,[117] the English law may have changed somewhat. Indeed, some commentators have gone so far as to suggest that the Mancini rule may have been abolished altogether.[118] In a thorough discussion of the subject,[119] English has shown fairly conclusively that such a change was not intended by the legislature, and doubts that the rule has been abolished altogether. However, because Section 3 undoubtedly does confer on the jury alone the task of deciding whether or not a reasonable man would have reacted as the accused did, the status of the rule has been affected to the extent that it is now only one of the factors which the jury may consider in its determination of that question.

This opinion seems to be borne out by the latest judicial pronouncements. In Walker,[120] the Court of Criminal Appeal acknowledged that there may be some force in the submission that the Mancini rule is no longer good law, but at the same

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117. In particular, Section 3 which reads, "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man to do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

118. [1963] Crim. L.R. 507; [1965] Crim. L.R. 304 and 729. [1967] Crim. L.R. 711; [1969] Crim. L.R. 249.

119. "What DID Section Three do to the Law of Provocation" [1970] Crim L.R. 249.

120. [1969] 1 W.L.R. 311, 316.

time stated that

> "one vital element for the jury's consideration in all these cases is the proportion between the provocation and the retaliation".

And in Phillips,[121] in which the Privy Council was considering an appeal from Jamaica based on a provision worded identically to the Homicide Act,[122] the view was expressed that the Mancini rule remains part of the law. However, it was also said that the defence consists of two elements only, namely

> "'Was the defendant provoked into losing his self-control?'" and "'would a reasonable man have reacted to the same provocation in the same way as the accused did?'"

It is in deciding the second of these questions that the Mancini rule is of relevance, although it may be "prudent to avoid the use of the precise words" in which Viscount Simon formulated the rule in Mancini, presumably because there is a danger that the jury might think that the rule was one of law which it was bound to apply.[123]

If this is the case, the statement of Lord Devlin in Lee Chun-Chuen[124] can no longer be regarded as good law. There, it is stated that

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation".

Similar views were expressed after the Homicide Act in Wardrope,[125]

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121. [1969] 2 A.C. 130, 137.

122. Section 3c of the Offences Against the Person (Amendment) Law (Jamaica), 1958.

123. For a discussion of the apparent inconsistencies in Phillips and Walker, see Glazebrook, "The Bad Tempered but Reasonable Man" (1969) Camb. L.J. 172.

124. [1963] A.C. 200, 231.

125. [1960] Crim. L.R. 770, 771.

Church[126] and Adams.[127] If what has been said subsequently in Walker and Phillips is now the law, these decisions would no longer seem to be correct.

To summarise, the present English law may be stated as follows; where it appears that something was said or done to the accused as a result of which he lost his self-control and killed, the issue of provocation must be left to the jury. The latter must then decide whether the accused did lose his self-control, and whether a reasonable man would have behaved as the accused did, and one factor which they must take into account in deciding this is whether there existed a degree of proportion between what was done to the offender and his retaliation. What is clear is that the trial judge may no longer rule that, because the provocation and the retaliation were disproportionate, there is no question fit for the consideration of the jury. This point was expressly decided in Phillips,[128] and in its light, it may now safely be concluded that, whatever else its status may be, the Mancini rule cannot be characterised as a rule of law.

Whereas the recent English trend has been to move away from treating reasonable relationship as though it were an independent element of the doctrine, the New Zealand law has tended to move, if anything, in the opposite direction. It is a simple enough matter to state the law, but that simplicity is deceptive, and the current status of the rule cannot

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126. [1966] Q.B. 59.

127. (1961) 12 C.L.Y. 1954.

128. [1969] 2 A.C. 130, 137. And cf. Cascoe [1970] 2 All E.R. 833.

readily be seen apart from its application in practice. It may be stated in two parts.

1. "the relationship or disproportion between the acts or words of provocation and the mode of retaliation is a factor, and indeed a weighty factor, to be considered by the jury in considering whether there was provocation. It is not, however, to be elevated into a matter of law." 129

2. In deciding whether there is evidence of provocation, "It is necessary for the judge to ask himself, 'could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?' In short, 'that a reasonable person so provoked could be driven, through the transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death'." 130

There was a reference to the dangerous weapon aspect of the rule in Jackson,[131] where Chapman J. told the jury that

> "It is one thing to provoke a blow with a fist, and quite another thing to provoke a stab with a knife of the deadly type you see here.... Fists and walking-sticks are very different from firearms and knives."

But the learned judge expressly stated that he was not laying down any rule on the subject, and explained that this was one factor which the jury should take into account in deciding the question of sufficiency. No mention of the rule is made in Kahu,[132] in which the offender perpetrated a double killing, inflicting fatal injuries with a razor and a claw-hammer, although Mancini's case was cited on another point.

The present law was perhaps adumbrated in Black,[133] in

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129. Noel [1960] N.Z.L.R. 212, 219.

130. Anderson [1965] N.Z.L.R. 29, 36.

131. [1918] N.Z.L.R. 365.

132. [1947] N.Z.L.R. 368.

133. [1956] N.Z.L.R. 204.

which the Mancini rule was applied, and made the basis for the Court's ruling that there had been no miscarriage of justice within the meaning of Section 4 of the Criminal Appeal Act, 1945. There was a history of ill-feeling between the parties, and in giving evidence, the offender stated that his victim had called him a "yellow Irish bastard", and punched him in the left eye. It was argued that this constituted sufficient provocation to reduce the killing to manslaughter. There is no mention in the Report of the trial judge's direction on the issue, but he had earlier told the Grand Jury that there seemed to be no "opening" of provocation.

In effect, the Court of Appeal ruled that there was no evidence of provocation,

> "for it is apparent that the blow was intentionally delivered at a vital part of the victim's body with a sharp weapon and with considerable force at a point of time when the appellant was not in personal peril and when it could not possibly be said that the provocation alleged by the appellant justified the use of a knife".

It is submitted that, having regard to the state of the N.Z. Statute in 1956,[134] which quite clearly made the question of sufficiency one for the jury, this decision is not above criticism. To begin with, the passage cited shows a dangerous degree of confusion between provocation and self-defence. Further, there was here, evidence, albeit contradicted and unpromising evidence, that the offender had been insulted and struck. But the fact that there was overwhelming evidence

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134. Section 184(3), Crimes Act, 1908. Which read "Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact". And see Jackson [1918] N.Z.L.R. 365.

against the offender does not prevent there being some evidence in his favour. How can it be said, in a capital case, that there is no "miscarriage of justice" when the jury is precluded from considering a point which it may have resolved in his favour. As Lord Tucker put it in Bullard,[135]

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice, and it is idle to speculate what verdict the jury would have reached."

Be that as it may, the idea that the Mancini rule had been transplanted into New Zealand law in spite of the wording of the relevant legislation, appears to have taken root. In the case of Noel,[136] almost certainly the origin of the present law, the question was canvassed at length, and for these reasons the case warrants a detailed examination. The offender had caused the death of his wife by inflicting thirty stab wounds with a pair of scissors which, it was conceded, were readily at hand when the parties quarrelled. In his direction to the jury, the trial judge laid considerable emphasis on the mode of retaliation. He read the jury a passage from Duffy,[137] commented on the relationship question and concluded his summing up with a passage, acknowledged by the Court of Appeal to be "unhappily phrased", in which he said

> "you must act on the sudden and also with the mode of resentment in proportion to the insult received".

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135. [1957] A.C. 635.

136. [1960] N.Z.L.R. 212.

137. [1949] 1 All E.R. 932; 933 which reads. "Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation."

When the jury returned for further direction on provocation, the judge again emphasised the relationship question, and concluded,

> "The substantial question may be, and this is a question for you, whether or not what the accused did bore any proper and reasonable relationship to the provocation that he received. If you think that it did, then you would be justified in reducing the charge of murder to one of manslaughter. If, as twelve practical men, applying your commonsense to the whole of the evidence, you should consider that what he did was out of proportion to the provocation that he received, then you would be entitled, ... to convict him of murder."

Counsel for the appellant does not appear to have argued that this raised the proportion test to one of law. Rather, he contended that the trial judge had in effect made the rule a "condition precedent" to the application of the provocation Section. He then levelled a sustained attack on the rule, by arguing that when the Criminal Code was drafted, enacted in 1893 and later in 1908, the Mancini rule was not part of the Common law and could not therefore have been intended by the legislature. Subsequent developments in the Common law could not affect the New Zealand position. By virtue of S.184(3) of the Crimes Act 1908, sufficiency was to be treated as a jury question.

In reply, the Court undermined the premise on which this impressive argument was based by saying that the Judge had left the issue to the jury as a question of fact.[138] Having done that, the Court then ruled that this approach was consistent with both the Common Law and the Crimes Act 1908. Reference was made to Att-Gen. for Ceylon v. Perera, and in

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138. Cf. the directions of the Trial Judges in Lewis and Dougherty post p.95.

particular to the passage which has been criticised above as a non-sequitur.[139] It did not matter that the New Zealand provisions do not use the word "grave"; the same consequence as that contended for by Lord Goddard was achieved in New Zealand by the requirement that the insult or wrongful act be of such a nature as to deprive an ordinary person of the power of self-control.

It is submitted that the Court's evident desire to achieve conformity with the Common Law gives rise to some misgivings, especially where this involves adding to legislation an unwarranted gloss. All that the Section required was that the incident should have been of such a nature as to deprive the ordinary person of the power of self-control. It did not go on to require speculation by the jury that the ordinary man would have reacted in every respect as the accused did.[140] This is not to deny that the law could logically do so, but it will be argued that such a requirement is unrealistic,[141] and having regard to the fact that the law did not (and still does not) expressly import it,[142] the decision is a regrettable one.

Be that as it may, Noel is undoubtedly still good law. Not only was the point reiterated in McGregor,[143] but on two subsequent occasions, the Court of Appeal has directed a new trial

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139. Supra p.83.

140. For an elaboration of the importance of this point, see White; "A Note on Provocation" [1970] Crim. L.R. 446.

141. Post p.100.

142. As it imported the time element by the use of the word "sudden". Section 184(1) Crimes Act, 1908.

143. [1962] N.Z.L.R. 1069.

on the grounds that the trial judge elevated the rule into one of law. In Lewis,[144] the Court held that it was a grave misdirection to tell a jury that

> "The law is quite clear that the retaliation and the mode of resentment must bear a proper and reasonable relation to the provocation itself".

And in Dougherty,[145] it was held that the trial judge had erred when the jury was directed that

> "You as a jury must also consider whether the killing bears any proper and reasonable relation to the provocation given. You have to consider whether the provocation here given, that is to say the blow on the head with the chopper, bore a reasonable relationship to the killing in retaliation. If you think the act done is altogether out of proportion to the provocation given, the defence is not established."

These directions are cited at some length to show what the Court means when it speaks of elevating the test into a proposition of law. It is, with respect, very difficult to see any difference in substance between what was said in Noel and in Lewis and Dougherty. Indeed, in Noel's case, counsel pointed out that many English dicta appeared to treat the proportion rule as one of law, and cited Russell on Crime, 11th ed., 612 in support of this interpretation. The Court agreed that even if these dicta represented English law, they did not apply in New Zealand. But one of the three cases to which Russell refers[146] is the case of Duffy, and the trial judge in Noel had actually read the direction on proportion from Duffy[147] to the jury. This point appears to have been blithely overlooked.

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144. (1962) unreported. C.A. 92/62.

145. [1966] N.Z.L.R. 890.

146. The other two are Gauthier (1943) 29 Cr.App.R. 113; and McCarthy [1954] 2 Q.B. 105.

147. For the text of which see supra n.137.

What these cases illustrate very clearly, it is submitted, is that it is extremely difficult for a trial judge to direct the jury in terms of the reasonable relationship rule without creating the impression that he is enunciating a point of law. The difficulty is perhaps this; there is a strong feeling that, once a person, (either an ordinary man or the offender himself) has "lost his self-control", he is apt to behave in the most irrational of ways; his violence, once he has determined to resort to it, and once he has formed the intention to kill, is likely to be extreme.[148] If a juryman who does hold such views is then told that one of the factors which he should take into account is the reasonable relationship rule is he not likely to think that this is a rule which he must take into account, even when he is told that the question is one of "fact" for him to decide? If his own experience leads him to believe differently, how can he think otherwise than that the law is imposing some sort of limitation which he is not free to ignore? It is appreciated that difficulties in explaining the law to a jury are no argument in themselves for criticising the substance of the law, but it is submitted this is a practical factor which should be weighed in the balance when testing the merits of the Mancini rule.

A further difficulty in allocating the Mancini rule a status in New Zealand law is the fact that, although the Courts have repeatedly insisted that it should not be elevated into a matter of law, the trial judge may, on the basis of a lack of proportion between what was done to the offender and his

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148. This is a feeling which the writer shares, although it is appreciated that others may believe differently. There is no statistical data to substantiate either viewpoint.

retaliation, withdraw the issue from the jury on the basis that there is then no evidence of "provocation". It may well be a fruitless exercise to attempt to classify all of the considerations arising for determination as either law or fact, but it would seem that, in this sense at least, the Mancini rule more closely resembles the former than the latter. That it undoubtedly states the law is clear from Anderson,[149] in which the offender, after his de facto wife had confessed unfaithfulness to him at a party, and after assuring others at the party that he had "calmed down", proceeded to deliver a prolonged and sustained beating as a result of which she died.

No proof of what the victim had actually said was given at the trial, and on that basis the issue was withdrawn from the jury. Although the Court of Appeal disagreed with this ruling, it held that the issue need not have been left in any case since,

> "the brutal and long-sustained attack made on the girl could not have been provoked by the material here suggested. Therefore there was no evidence fit for consideration by the jury which might have been held by them to raise a doubt as to whether the homicide was murder or manslaughter."

In reconciling this approach with Noel and Lewis, the Court pointed out that it had not there been called on to decide whether there was evidence fit for consideration by a jury, but was concerned with the correctness and adequacy of the trial judge's directions.

Despite that, Anderson's case marks a significant new direction in the New Zealand law and practice, as is evident

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149. [1965] N.Z.L.R. 29.

by comparing it with Jackson. Although the Court made no reference to it, a significant change had been made in the 1961 legislation which goes some way towards explaining the new approach. That was the introduction of Section 169(3) to provide that

> "Whether there is any evidence of provocation is a question of law".

Criticism of the decision may well be a work of supererogation, but it is submitted that the case is objectionable in a number of respects.

To begin with, it is difficult to see any warrant for introducing tests in addition to those contained in the clear words of the Section. In New Zealand, what may amount to provocation is defined as being anything said or done if

> "in the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control".

In deciding Anderson, the Court refers extensively to the Common Law, including Holmes and Lee Chun-Chuen, the effect of which, as has been pointed out earlier, was nullified by the Homicide Act 1957.[150] The Court also relies on the Homicide Act itself, which provides that the test (for the jury) is

> "whether the provocation was enough to make a reasonable man do as he (the accused) did".

As the Court points out, "Section 169 of our Act is expressed somewhat differently, but in our opinion the Common law rule still applies". With respect, if the legislature had wanted to adopt the provisions of the Homicide Act, the opportunity went begging in 1961. Worse, the Court, admittedly without the

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150. See supra p. 87.

benefit of Phillips,[151] misinterpreted the Homicide Act. Further, it is submitted, the difference in wording between the respective provisions is in this instance crucial.

An interesting and important analysis of the Homicide Act 1957 is undertaken by Stephen White, who points out that the phrase "do as he did" may mean one of three things. It may mean that the jury must be able to posit only that a reasonable man would have lost his self-control, or, that a reasonable man would have killed, or it may mean that it must be possible to posit that the ordinary man would have acted in every respect precisely as the accused himself did. If the last of these is the correct interpretation, then the reasonable retaliation rule would be retained in the wording of the Statute itself. He also points out that the words "provoked" and "provocation" may be subjected to the same analysis, pointing out that, if it is ever intended to dispense with the Mancini rule, it may also be necessary to either avoid using the words "provocation" and "provoked" altogether, or at least to define them in such a way that the rule cannot be re-introduced by a process of judicial interpretation.

The importance of this for New Zealand is that the Crimes Act does not use the phrase "do as he did", and it does define "provocation". According to the Statute, it is necessary only that it be possible to posit that the conduct was sufficient to deprive an ordinary man of the power of self-control. No further limits are imposed. Even taking into account the change effected by Section 169(3), it must then be concluded that the extent of the defence is limited by

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151. [1969] 2 A.C. 130.

considerations not expressed in the Section itself. On principle, it is submitted, the construction of a penal statute in such a way that it operates against the offender, is undesirable.

(iv) Criticisms of the Rule

Apart from the difficulties presented by the state of the law itself, the Mancini rule is open to a number of other criticisms. Some of these will be considered.

It is frequently asserted that the rule is "illogical",[152] that once a person has "lost his self-control", we cannot as a matter of logic expect him to select his weapon with care, or to restrict himself to one or two blows. As has already been suggested, the logic supporting this criticism is largely semantic.[153] Probably, this criticism is a cloak for those who believe that the rule is unrealistic. The rationale of the ordinary man test is that the concession to human frailty is made because others placed in the same circumstances as the offender might have retaliated in the same way. Experience, and such evidence as there is,[154] seem to indicate that some people, who cannot be called other than ordinary, when pressed beyond the threshold of their endurance, will select whatever weapon comes to hand, whether it be a Bren gun, a machete, or even the bare hands. Although it may well be that no judge would ever withdraw the issue from the jury in such circumstances, there is no doubt that, should he feel so inclined,

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152. Ng Yiu-nam [1963] Crim. L.R. 850.

153. See supra p. 53.

154. For a consideration of this, and a balanced discussion of the merits of the Mancini rule generally, see English, op.cit., 264.

he is entitled to do so. There is the added danger, already mentioned, that special reference to the rule as a "weighty factor" will only cause confusion in the minds of the jury. For these reasons, it is submitted that the dangerous weapon aspect of the Mancini rule could well be dispensed with altogether.

Difficulties still remain in those cases where the violence used is prolonged and brutal. Insufficient is known about the causes of such violence to enable us to say that no ordinary man would ever resort to it. But is it not at least possible, as a matter of common sense, that frustrations built up over a prolonged period of time, once released, are likely to manifest themselves in particularly vicious violence? Certainly, it is arguable that to formulate a rule to the contrary, which a jury should take into account, and which a judge may use as the basis for withdrawing the issue, places too great a premium on only one view as to what constitutes ordinary behaviour.

One further criticism, which has been levelled in particular at the dangerous weapons aspect of the Mancini rule, that "fists may be answered with a fist, but not with a deadly weapon", is that its effect is to make the defence converge with self-defence, to the extent that, if literally construed, provocation as a separate defence would disappear altogether.[155] Commentators took some delight in querying how the mere sight of one's spouse in adultery could ever be proportional to a killing, a criticism made even more pertinent when the Homicide Act, 1957 includes words and gestures as potential provocation. Were the legislators giving the lie to the old adage that

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155. See Iliffe, "Provocation in Homicide and Assault Cases" (1954) 3 I.C.L.Q. 23, 38.

"names will never hurt"?

It is submitted that, as far as the New Zealand law is concerned, some of the barbs are drawn from these taunts because of the fact that, whether the rule is considered by the judge or the jury, this is done only as one factor in deciding how an ordinary man might have behaved. The criticism, on the other hand, proceeds on the footing that the rule is an element in addition to the ordinary man test. This comes about because the critics virtually assume that the rule is unrealistic, and they are then forced to explain it on a different basis. Iliffe states[156] that

> "it will be clear that if the accused has really lost what is regularly called his 'self-control', he may readily return violence with whatever weapon he may have in his hand",

and Williams,[157]

> "if he (the offender) intended to kill, it is a little difficult to see why importance should be attached to the mode of killing, provided of course that the killing was in hot blood".

The only possible alternative is then that the Mancini rule states a quasi self-defence rule in addition to the ordinary man test. Unrealistic as the New Zealand law might be, it clearly treats the rule as a part of the ordinary man test.

(b) The Time Factor

(i) Introduction

The lapse of time between what was done to the offender and his subsequent retaliation is the other factor present in every case in which provocation is pleaded. It is perhaps the

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156. Ibid.

157. Williams, "Provocation and the Reasonable Man" [1954] Crim. L.R. 740, 748.

classic example of a consideration which is of dual relevance, indicating both whether the offender had actually lost his self-control, and whether an ordinary man would have regained his composure in the time which elapsed before the offender struck. For both purposes, it may be said that as a rule, the further removed in point of time that the retaliation is from the provocative incident, the more likely it is that the fatal conduct was precipitated by considerations other than that incident.

(ii) History

Historically, the proper emphasis to be placed on the time factor caused far less difficulty than was raised by the reasonable retaliation rule. Some of the earlier writers contemplated that this period might extend over a surprising length of time. Hale instances the case of two men who, having quarrelled, go away to fetch weapons and return to fight;[158] such cases were treated as manslaughter only. It is by no means certain that, prior to Welsh,[159] the lapse of time was taken into account for purely subjective reasons. Indeed, as Oneby's case[160] shows, the law was quite prepared to place limits on the duration of a man's passion, even though it was clear that he acted in a fit of temper. In that case, the lapse of time was the subject of express comment. But not infrequently, in cases where the interval was particularly lengthy, a killing would be treated as murder rather than manslaughter on the broad ground that wickedness

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158. 1 Hale P.C. 453.

159. (1869) 11 Cox C.C. 336.

160. (1727) 2 Ld. Raym. 1485; 92 E.R. 465 and see supra p. 30.

and thus malice could more readily be inferred. Thus in Willoughby,[161] two soldiers were refused service by a publican late one evening. They departed, and returned armed after an interval of an hour and a half, and when they were again refused service by the publican, they killed him. This was held to be murder because the evidence showed that they returned with the deliberate and wicked intention of using personal violence.

Because of the lack of authority on the point, the precise weight accorded the time factor cannot be ascertained with any certainty. It has already been argued that, if a considerable period of time elapsed, the Courts would treat a killing as murder other than manslaughter, and this was the approach adopted in Oneby itself. However, as the practice of requiring special verdicts became less frequent, the method of treatment seems to have changed somewhat. One incongruous result of this change in procedure is illustrated in the case of Fisher.[162] The provocative incident relied on was the commission of an (apparently consensual) sodomitical act between the victim and the offender's son, an incident of which the offender was apprised the day before the killing. Park J. decided to leave the issue to the jury, reminding them that

> "There must be an instant provocation to justify a verdict of manslaughter".

Having left the issue, he then attempted to withdraw it again by saying

> "The counsel for the prisoner admits, that if the blood had time to cool, it will be murder. But I say, in the hearing of two very learned persons,

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161. Vol. 3 Russell, C. & M.; p.42 6th ed. And see Mason's case (1756) Fost 132; 168 E.R. 66.

162. (1837) 8 C. & P. 182.

> that that is not exactly a question for you. Whether the blood had time to cool or not, is rather a question of law. But the jury may find the length of time which elapsed."

Although this does reiterate, almost verbatim, what was said by Holt C.J. in Oneby, Park J. appears to have failed to appreciate the difference caused by the change in procedure; and the jury not only returned a verdict of manslaughter, but also added a recommendation to mercy on the ground of provocation.

Fisher was decided at a time when the judges were developing the practice of leaving the issue of provocation to the jury. It is probable that, in 1837, Park J. could have told the jury not to return a verdict of manslaughter at all, since the evidence as to the lapse of time appears to have been uncontradicted. But shortly before the case, there are several references to the time factor in the reported directions. Without exception, these references are ambiguous, in the sense that they are capable of interpretation in both subjective and objective senses. Thus in Lynch,[163] Lord Tenderten C.J. told the jury that

> "If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter".

Similar ambiguities may be seen in the directions in Hayward,[164] and Selten,[165] which was decided, significantly enough, after the enunciation of the reasonable man test in Welsh.[166]

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163. (1832) 5 C. & P. 324.

164. (1833) 6 C. & P. 157.

165. (1871) 11 Cox C.C. 674.

166. (1869) 11 Cox C.C. 336.

Nothing occurred to further clafify the common law position before the codification of New Zealand's criminal law in 1893.[167] That considerable emphasis was placed on the time lapse is evidenced by the fact that the Criminal Code, re-enacted verbatim in 1908, contained no less than three references to it. Section 165(1) provided the Offender must have been actuated by "sudden provocation", and Section 165(2) stipulated that the conduct of the victim could only constitute provocation

> "if the offender acts upon it on the sudden and before there has been time for his passion to cool".

Although no cases are reported in which the interpretation of these provisions was decisive, several comments may be made as to the way in which they were administered. Unlike the position with the reasonable relationship rule, there has never been any question that the time factor is only one facet of the reasonable or ordinary man test. In England, this eventually became a factor which was taken into account by the judge in deciding whether the issue of provocation should be considered by the jury at all. This change in treatment is illustrated by a comparison of the case of Albis[168] with several later decisions. Albis alleged that, some thirteen hours before the fatal incident, he had been invited by his victim to commit sodomy. When his victim was asleep, Albis struck him several blows with an axe. In dismissing the appeal, Darling J. laid particular emphasis on the period of time which had elapsed. He then said that

"If the provocation took the form of blows, and

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167. Criminal Code Act, 1893. In particular Section 165.
168. (1913) 9 Cr.App.R. 158.

> only a short time elapsed between the blows and a murder, a jury might be warranted, on receiving a proper direction from the judge, in reducing the verdict to one of manslaughter".

Several years later, Viscount Simon L.C. in Mancini[169] rationalised the lapse of time more explicitly in reasonable man terms. Conduct would amount to provocation only where a judge or jury was left in some doubt

> "whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool".

Thus, it would have been open to a judge, prior to the Homicide Act, 1957, to rule that because too great a period of time elapsed between the provocation and the retaliation, that no jury issue was raised at all.

The single reported instance shedding light on New Zealand practice prior to 1961 is found in Kahu.[170] Evidence was given to the effect that the wife of the offender, and a neighbour, had for a considerable period of time, to the knowledge of the offender, been indulging in an adulterous relationship. It appeared that Kahu and his wife had effected a reconciliation of sorts. No evidence was given as to what actually sparked the killings,[171] but the offender killed both his wife and the neighbour. In directing the jury on the time factor, the trial judge said

> "In this particular case, it is suggested that there had been a long series of adulterous associations

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169. [1942] A.C. 1, 9. and see Holmes v. D.P.P. [1946] A.C. 588, 597 and Kwaku Mensah [1946] A.C. 83, 93.

170. [1947] N.Z.L.R. 368.

171. This could now be the subject of adverse comment by the trial judge. Section 4 of the Crimes Amendment Act, 1966.

> between Mrs Kahu and Massey Amundsen - that such had been going on for some time. Therefore, it was no sudden provocation. I do not know how, on the evidence, the defence is going to get over the fact that it was no sudden provocation. You cannot come along six months later and say you were suddenly provoked into it. If the position were that he suddenly found them in the act of adultery when he thought that such associations had ended, I can understand that, because in such a case the suddenness is there. You are asked to accept that suggestion, and it is for you to say whether or not you accept that."

It is not possible to draw firm conclusions from this, since it seems that the jury were permitted in effect to speculate that some incident must have occurred to precipitate the killings. What is significant, it is submitted, is that even though the trial judge himself was clearly of the opinion that the defence advanced did not satisfy the requirements of "suddenness", he did not withdraw the issue from the jury altogether as a result. Nor did the Court of Appeal take the point, when it allowed an appeal on the grounds of a misdirection as to the burden of proof. Furthermore, Mancini's case, which contains such a clear statement as to the effect of English law, was cited to the Court on a different point.

(iii) The Present Law

In 1961, the Crimes Act was amended, and all three references to the time element in the 1908 legislation were deleted from the new provisions. Notwithstanding this, it would seem that the present law is, if anything, less advantageous to an accused person than was formerly the case, in the sense that the trial judge may now withdraw provocation from the jury if he considers that too much time elapsed.

This change in the law occurred as the result of the insertion of Section 169(3), which provides that

> "Whether there is any evidence of provocation is a question of law".

The relevance of the time lapse to the question of actual loss of self-control is most clearly illustrated in a passage in the judgment of the Court of Appeal in Clark.[172] There it was stated that

> "In our opinion then the lapse of time between the first ineffectual effort on the part of the appellant to shoot Ethel Kirk and the second shot which killed her shows only too plainly that even if it was possible, though improbable, that at the beginning of the incident he had lost his power of self-control, he had regained control when the act of killing occurred. This being the view we take it follows that in our opinion Quilliam J. was right in ruling that there was no evidence of provocation to support a finding of provocation."

In addition, the time factor is still of considerable importance when the tribunal is considering whether an ordinary man would have lost his self-control. A thorough review of the law on this point was undertaken for the first time in New Zealand in the important and difficult case of McGregor.[173] For some time, the offender and his neighbour had been engaged in a series of minor disputes, mainly over fencing matters; trivial arguments which nevertheless generated a considerable degree of animosity. On the day in question, McGregor's father, who resided with McGregor as a member of the household, accepted the neighbour's invitation to drinks. It was expressly noted by the Court of Appeal that there was no evidence that this invitation was made with the intention of riling the offender,

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172 [1971] N.Z.L.R. 589. C.A. 46/70. The case is unreported on this point.

173. [1962] N.Z.L.R. 1069. Cf. Parker (1963) 111 C.L.R. 610 (H.C.) (1964) 111 C.L.R. 665 (P.C.). In which the provocative conduct of the victim persisted over a period of six weeks, culminating in an incident which occurred some thirty minutes before the fatal injuries were inflicted. It was held that neither of these lapses of time was sufficient to prevent there being at least a case to go to the jury.

but McGregor, who had himself been drinking, interpreted his father's acceptance as an act of disloyalty. When he challenged his father with this, an argument ensued, but McGregor permitted himself to be pacified. Not long afterwards, however, he was seen walking through the house with a rifle, and heard to utter imprecations against his neighbour. As luck would have it, the neighbour chose that precise moment to emerge from his house, and he was shot and killed.

It is not entirely clear from the Report exactly what event or events counsel relied on as constituting the provocative incident, but he appears to have advanced a two-pronged defence, relying on both the conduct of the father in accepting the invitation[174] and on the past arguments between the parties, culminating in the invitation, the last act of the victim himself which could possibly be interpreted as provocation. On those somewhat unpromising materials, it is scarcely surprising that the defence failed, but the Court indicated at some length the way in which the time factor should now be treated.

Counsel for the offender advanced the somewhat optimistic argument that, since the 1961 Crimes Act did not refer to the time element, it had become entirely irrelevant. In his words, "Once suddenness is no longer required, there is no end to the remoteness of possible provocation." Therefore, he contended, the trial judge had misdirected the jury in telling them that the words or acts complained of could amount to provocation only when they occurred immediately before the killing.

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174. As to which see post p. 147.

As a preliminary step towards the refutation of this argument, the Court outlined the relevant common law, concluding that

> "Throughout the development of the doctrine it is emphasised both in the cases and by the institutional writers that there must be a close relationship in point of time between the provocative act and the retaliatory act, and more often than not the word 'sudden' was used to describe this relationship".

Having ascertained this, attention was then directed to the statutory provisions. It was considered that, were it not for the change in the text of the legislation, there would be no warrant for the inference that the common law was no longer relevant. However, the Court adopted the submission of the Solicitor-General that the common law had been expressly retained by the use, in S.169(1), of the phrase "under provocation". It is implicit in these words that the offender should react suddenly, and because it is for a trial judge to indicate to the jury what the law means the direction was perfectly proper. Indeed, he should tell the jury that

> "it was of the essence of provocation that it should cause a sudden and temporary loss of self-control.... This being so, it necessarily followed that the Judge was quite right in telling the jury that the time element was of importance."

Had the Court left the matter there, this aspect of the case would have raised few difficulties. Perhaps because the Section was a new one, the Court allowed itself to speculate as to why the legislature should have omitted all reference to the time element, and proffered the opinion that the legislature intended to

> "ensure that none of the common law guides for determining whether provocation had been established was elevated into a matter of law.... We agree that it would have been wrong if he (the trial judge) had told the jury that as a matter of law it was necessary that the provocation should occur immediately before the killing."

In the abstract, this suggestion seems plausible enough. What really causes puzzlement is the clear ruling of the Court that, because the conduct of the neighbour was not sufficiently closely related in point of time to the killing, there was no evidence of provocation fit for consideration by the jury.[175] To put the point at its sharpest, Section 169(3) expressly states that this is a question of law, and that is the sub-section which the trial judge utilises when he withdraws the issue from the jury.

The conundrum which these apparent contradictions present has already been referred to in connection with the reasonable relationship rule. At the risk of appearing to labour the point, if the judge may withdraw the issue of provocation because the lapse of time is too great, but the time lapse is not to be elevated into a question of law, then what precisely is its status? Is there any point in denying that, ultimately, the time factor is and must be a matter of law? And if this is an element of the defence, why should the jury not be told that it is? Surely the normal practice in a criminal trial is that the judge describes the elements of the offence charged and the available defences, and leaves the jury to apply that law to the facts of the instant case.

Part of the difficulty is caused by the peculiarly open-textured character of the word "provocation". In at least one sense, the word seems naturally to import some sort of immediate reaction on the part of the person said to be "provoked"

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175. Cf. too Anderson [1965] N.Z.L.R. 29, 38. "There clearly was time for passion of an ordinary person to cool...." Hence, it was ruled, there was no evidence of provocation.

But in fact, our usage is a matter of degree. Thus, if a person berates another immediately upon the occurrence of an annoying incident, we readily say that he is "provoked" into doing so. Should he delay his reaction for an hour or so, we would be less inclined to describe his reaction in such a way. If a day or so elapses, then it would strain language too far altogether to say that the reaction was "provoked", although it may in fact be the real cause of his tirade. Insofar as the law, in deference to these considerations, places outer limits on the meaning of the word "provocation", it does not deviate from this ordinary language meaning. But difficulties inevitably occur in the penumbral cases falling somewhere in between the instantaneous reaction and the day or so lapse.[176] Crudely put, the point is that opinions may differ as to the use of language, and as to which side of the dividing line any particular case falls. Judges are not immune from this difference of opinion. But once a judge rules that the offender has waited too long, he is placing a limit on the meaning of the word "provocation", and preventing the jury from disagreeing with his interpretation of the facts. In this sense at least, the time factor cannot be anything other than a rule of law.

(iv) <u>The Slow Burning Temperament</u>

Express reference to the time element by a trial judge is less likely to cause confusion in the minds of the jury than

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176. Hale 1 P.C. 453 says that "If there were deliberation, as that they meet the next day, nay, tho it were the same day, if there were such a competent distance of time, that in common presumption they had time of deliberation, then it is murder."

is reference to the reasonable relation rule. Most critics are prepared to accept that ordinary men do cool off within a reasonably short space of time. But reaction periods do vary, and it has been said that Samoans in particular are prone to brood about their grievances for a considerable period of time before anything is actually done by way of resentment.[177] As the Solicitor-General pointed out in McGregor, this peculiarity is not necessarily confined to Samoans, and in his submissions, the legislature may have deleted reference to the time element in the 1961 legislation to cater for this consideration.[178]

This possibility is not without its difficulties and it was dealt with by the Court with some circumspection.

> "It is unnecessary, and perhaps undesirable that we should impress any concluded opinion on this submission, though we would point out that if [he] be right, caution would be called for at this point because the longer the lapse of time the greater the probability that the accused acted from feelings of vengeance and not while suffering from a loss of self-control." 179

It is submitted that the difficulty adverted to by the Court is

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177. Marsack, "Provocation in Trials for Murder". [1959] Crim. L.R. 697.

178. In the House of Representatives, this was one of the two changes referred to by the Minister of Justice, the Hon. J.R. Hanan. He said, "There is one other change in the law relating to provocation which requires mention. For provocation to be successfully pleaded today in order to reduce murder to manslaughter, one must establish the act of provocation was immediately prior to the commission of the offence. This disregards psychological reality for it may well happen that instead of blazing up at once a man may brood perhaps for hours over a provocation until his control snaps. It all depends on the type of person. In the Bill there is no such artificial restriction, and if there has been in fact provocation, and loss of control it is open to the jury if it thinks fit to return a verdict of manslaughter." N.Z. Parliamentary Debates, Vol.328, p.2681.

179. [1962] N.Z.L.R. 1069, 1078.

purely an evidentiary one, and if the offender's allegation that he was suffering from a loss of self-control is believed, or rather not disbelieved, by the tribunal, he is entitled to a verdict of manslaughter rather than murder.

A rather more substantial difficulty is that the taking into account of individual reaction times involves some deviation from the ordinary man test. As the Crimes Act is worded, this need not necessarily affect the result, provided that the conduct of the victim was

> "sufficient to deprive a person having the power of self-control of an ordinary person ... of the power of self-control".

It is arguable that the length of time which elapses does not affect the provocative character of the conduct of the victim, the quantum of the provocation offered; in cases of the slow-burning temperament, the loss of self-control simply manifests itself in an unusual way. I.e. that an ordinary man would lose his self-control when confronted by the same conduct, the only difference being that he would do so more immediately. The difficulty with this interpretation is that the offender must be treated as though he has the "power of self-control of an ordinary person", and the Court may well hold that this must be the case in every respect, and that there is no warrant for the construction suggested. All that can be said is that on one interpretation it is open to the Courts to allow the slow-burning temperament to be considered, and it may be that trial judges will be reluctant to withdraw the issue from a jury where the peculiarity is traceable to race.[180]

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180. The issue is further complicated by the fact that Section 169(2)(a) now permits the characteristics of the offender to be taken into account as to which see post p. 133.

(c) Other Circumstances

(i) General

It would be a possible, if not particularly profitable exercise, to analyse the cases in terms of the various other factors which were taken into account by the tribunal in deciding whether the plea of provocation should succeed. These considerations are compendiously imported by the Crimes Act, 1961, Section 169(2)(a) of which provides that the issue is to be judged "in the circumstances of the case". Such circumstances would include the relative status of the offender and his victim,[181] and the previous relations between them. If there has been a history of disharmony between the parties, it may be that an otherwise trivial incident will spark off the killing.[182] The possible list of such circumstances is endless, and each case must be dealt with by the trial judge on its facts.

(ii) Drunkenness

One circumstance which the layman may be forgiven for thinking to be highly relevant is the offender's state of sobriety. In one sense he would be correct. Intoxication may be taken into account in deciding whether or not the offender had in fact lost his self-control. It is also probably

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181. E.g. husband and wife in Maddy (1672) T. Raym. 212; 83 E.R. 112, father and son in Fisher (1837) 8 C. & P. 182. And in Hopper [1915] 2 K.B. 431, it was considered highly material that the offender was a sergeant, and his provoker a mere private.

182. McGregor [1962] N.Z.L.R. 1069, 1080. And see Hopkins (1866) 10 Cox C.C. 229 in which evidence was admitted that on several occasions prior to the fatal incident, the victim had twisted a handkerchief around her husband's throat.

relevant when the offender, as a result of drunkenness, makes a mistake and interprets as provocative, conduct which was not intended to be.[183] But the common law, after some initial prevarication, has steadfastly declined to permit the plea that a person, as a result of drink, more readily gave way to his anger.

Some critics cavil at this aspect of the doctrine on the basis that it is tantamount to holding that ordinary men are never drunk. It is submitted that such criticisms are facile, although rephrased as a contention that the law can afford to be more realistic, they represent a value judgment which has some validity. But the rule that drunkenness is ipso facto irrelevant was evolved long before the reasonable man test was articulated.

Hale[184] and Hawkins[185] were of the opinion that a drunken person should be treated as though he were sober, whereas Blackstone,[186] who reiterated the views of Coke thought that, if anything, drunkenness aggravated the seriousness of the crime. That this surprisingly harsh view was rapidly mollified is illustrated by the fact that, exactly fifty years after Blackstone wrote, Holroyd J. in Grindley[187] stated that, drunkenness was a "circumstance proper" to be taken into consideration in deciding whether the accused really had acted

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183. Marshall (1830) 1 Lew.C.C. 76; 168 E.R. Letenock (1917) 12 Cr.App.R. 221. And see post p.149.

184. 1 Hale P.C. 32.

185. 1 P.C., C.1, S.6.

186. Bl. Comm. Vol. IV, C.2, S.III, 25.

187. (1819) 1 Russell C. & M. 6th ed. 144.

in the heat of the moment, and maliciously. This view he twice retracted shortly afterwards.[188] The basis of the present law was laid by Park J. in Pearson[189] and Carroll.[190] In the former, he said that

> "drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation",

by which he appears to have meant that drunkenness may be taken into account in deciding whether the offender was caused to act as he did by the provocation offered to him. The same point is made with greater clarity by Parke B. in Thomas[191] when he directed the jury that

> "drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober".

But in deciding the prior question whether the provocation given was sufficient, Park J. in Carroll held that Grindley had been wrongly decided, and that drunkenness could not be considered.

This view has been held to be good law in Stopford[192] and Mason,[193] and was the subject of considered dicta in the House of Lords in D.P.P. v. Beard,[194] Notwithstanding this impressive

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188. In Burrow (1823) 1 Lew. C.C. 75; 168 E.R. 965 and Rennie (1825) 1 Lew C.C. 76.

189 (1835) 2 Lew. C.C. 144.

190. (1835) 7 C. & P. 145.

191. (1837) 7 C. & P. 817, 820.

192. (1870) 11 Cox C.C. 643.

193. (1912) 8 Cr.App.R. 121.

194. [1920] A.C. 479. Although cf. Hopper [1915] 2 K.B. 431.

array of authority, counsel in McCarthy[195] appealed, contending that the trial judge had misdirected the jury by telling them that they were not entitled to consider the fact that the offender was the worse for drink. Not surprisingly, the appeal failed, and Lord Goddard buttressed the drunkenness rules by reference to the reasonable man test, saying that

> "We see no distinction between a person who by temperament is unusually excitable and pugnacious, and one who is temporarily made excitable or pugnacious by self-induced intoxication. It may be that an excitable, pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely on his excitable state of mind if the violence used is beyond that which a reasonable, or, as we may perhaps say, an average person would use to repel an act which can in law be regarded as provocation."

It is quite clear that this also represents the law in New Zealand. In Jackson,[196] Chapman J. was at great pains to distinguish an ordinary person from one inflamed by drink. And in McGregor,[197] it was held that a transitory state induced by liquor could not amount to a "characteristic". It is perhaps a telling social commentary that, in only two of the cases reported on the subject in this country was there no evidence that the offender had been drinking.[198] In eight others, there was evidence either that the accused was drunk or had been drinking,[199] and in all of them, the point is made that this

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195. [1954] 2 Q.B. 105, 112.

196. [1918] N.Z.L.R. 363.

197. [1962] N.Z.L.R. 1069, 1081.

198. Kahu [1947] N.Z.L.R. 368. Noel [1960] N.Z.L.R. 212.

199. Jackson (supra n.196). Black [1956] N.Z.L.R. 204. Lewis (1962) unreported C.A. 92/62. McGregor [1962] N.Z.L.R. 1069. Anderson [1965] N.Z.L.R. 29. Dougherty [1966] N.Z.L.R. 890. Downey [1971] N.Z.L.R. 97. Clark [1971] N.Z.L.R. 589. Millar (1971) unreported C.A. 96/71.

fact was not to be taken into account by the tribunal in deciding whether the conduct of the offender would have provoked an ordinary man.

(d) "Characteristics"

(i) Introduction

It was earlier argued that, embodied in the ordinary man test are the twin notions that society thereby demands that its members exhibit certain standards of restraint. At the same time, the standards are not set so high that the majority of those members are unable to comply with them. Hence, if the ordinary man might have behaved as the offender did, the conduct of the latter is treated as understandable but not completely excusable. And it was contended that society is entitled to demand such standards; that there is nothing morally objectionable about assessing the conduct of the offender in this way.

Not infrequently, where the law sets standards of conduct, it will not countenance arguments based on the individual's inability to conform as a result of either incapacity or lack of opportunity. There are, of course, some well-recognised incapacitating conditions such as infancy and insanity; but where, as in negligence, the selected basis of liability is the failure to conform to a standard of care, it is no defence for the offender to say that he is innately clumsy of slow-witted. Similarly, where liability is strict, neither incapacity falling outside one of the recognised categories nor the lack of opportunity to conform to the laws demands will in general excuse.[200] H.L.A. Hart has pointed out that the objection to

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200. For a discussion of some exceptions, see Patient; "Some Remarks about the Element of Voluntariness in Absolute Offences" [1968] Crim. L.R. 23.

punishing in such situations is not the mere factor that the offender was unaware of relevant surrounding circumstances, or failed to forsee that the prohibited consequence would or might occur, but simply that he was unable to prevent its occurrence. He argues that

> "what is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities". 201

When a person has been provoked, such capacities are not entirely absent, but their exercise is a matter of such abnormal difficulty, for both the offender himself and for ordinary men placed in his situation, that we punish less.

The difficulty is that the ability to conform to general standards, whether they be standards of care or self-restraint must inevitably vary from person to person. Where provocation and standards of restraint are in issue, two broad reasons for this diversity of capacity may be suggested. It seems to be the case that, temperamentally, some persons are more irascible or short-tempered than others. Although one can only speculate on the causes of this diversity, physiology and environmental circumstances (including historical circumstances) no doubt all play their part. In addition, the temperament is conditioned by more transient influences; illnesses, some debilitating condition such as pregnancy, even tiredness. Some people are also marked off from the remainder of the community, and the hypothetical norm envisaged by the ordinary man test, by their physical or mental makeup, and their status or position in

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201. Hart; P. & R. 152.

the community. As a result, they are susceptible to taunts or provocative action which would leave a person differently constituted completely unmoved. There is a conceptual difference between the two types of trait, although the two may in reality overlap, but they share in common the fact that a person afflicted by them will lose his self-control in circumstances in which an ordinary man would not do so.

Any attempt to individualise the conditions of liability by taking account of such considerations is rendered the more difficult because

> "if the notional person by whom the defendant is judged is invested with every characteristic of the defendant, the standard disappears. For, in that case, the notional person would have acted as the defendant did". 202

The law may confront this problem either by ignoring diversities altogether; or it may, as the New Zealand legislature has done, attempt to steer a middle course by taking into account some characteristics but not others.

(ii) The pre-1961 Law

Initially the law catered for these peculiarities without any real difficulty. Perhaps the earliest examples are the cases of Williams[203] and Taylor,[204] in both of which the offender was held guilty of manslaughter only, after he had been made the butt of racial jokes and antagonism. A clearer

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202. Williams; C.L.G.P. 101.

203. (1639) Jones W. 432; 82 E.R. 227. The case was in fact a prosecution brought under the Statute of Stabbing. Williams whose nationality may remain unspecified, was wearing a leek in his hat. A passerby pointed to a Jack of Lent, and told Williams to "look upon your countryman", a jibe which so enraged Williams that he immediately took up a hammer and threw it at his antagonist. He missed his mark, but struck and killed another bystander. The verdict of manslaughter was found upon a special verdict. In Mawgridge (1706) Kel.119 84 E.R. 1107, Lord Holt C.J. is highly critical of the decision, and says that the verdict should have been murder.

204. (1771) 5 Burr. 2793; 98 E.R. 466.

example of the way in which the personal equation was taken into account is found in the direction of Lord Tenderton C.J. in Lynch,[205] where the jury was told that

> "If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter".

This case has been treated as evidence that the question of provocation was originally "subjective", and that the "'reasonable man' doctrine did not at once crystallise into a rule of law.[206] It is submitted that the case is equally open to the interpretation that the law had already begun to steer a middle course.

Apart from these three cases, there is insufficient material upon which to base any assessment as to how far the law would go in taking account of the peculiarities of the offender. Undoubtedly, the turning point in the law was the articulation of the reasonable man test by Keating J. in Welsh.[207] It was over fifty years before the logical consequences of the decision began to manifest themselves as they eventually did in Alexander.[208] There, the provocative incident relied on was a statement by the de facto wife of the offender that she intended to live with another man. Counsel was prevented by the trial judge from addressing the jury on provocation. Before the Court of Criminal Appeal, he argued that although

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205. (1832) 5 C. & P. 324, 325.

206. Russell; 535 12th ed.

207. (1869) 11 Cox C.C. 336.

208. (1913) 23 Cox C.C. 604.

the conduct of the deceased might not have caused a "normal" man to behave as Alexander had, the offender was mentally deficient, and this fact ought to be considered. Unfortunately, he did not refer to the direction in Lynch, and Darling J. who delivered the decision, called this an "ingenious argument". It was nevertheless one which the Court would not countenance. Perhaps this refusal to consider Alexander's deficiency cannot be regarded as decisive, because the incident relied upon consisted of words alone, and there was a delay of two hours between the incident and the retaliation. But by the same token, Alexander's deficiency, had it been relevant, would have diminished the importance of these matters, at least to the extent that a jury question was raised by the evidence. Similarly in Lesbini,[209] in which the alleged incident was the racial "joke", "Does Ikey want some shots?" Again, it was argued that the offender suffered from "want of mental balance" combined with "defective self-control". Counsel's argument that Welsh should not be taken to its logical limits was unsuccessful, and the Court said that it could see no reason to depart from what had been said in Alexander.

With these two decisions, the reasonable man die was decisively cast. And in the same year as Lesbini was decided, a similar mould was fashioned for his female counterpart in Smith,[210] in which it was held that the fact that the offender was pregnant when she killed her young child must be treated as irrelevant. Only one case, Raney,[211] seems to have slipped

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209. [1914] 3 K.B. 1116.

210. (1914) 11 Cr.App.R. 36.

211. (1942) 29 Cr.App.R. 14. 17.

through the net. Raney, who was one-legged, became engaged in a quarrel with his victim, in the course of which his crutch was knocked away from him. An appeal was brought on the basis that the trial judge had erred in not adverting in his summing up to the offender's deformity.

> "It seems to us that if the judge had repeated that part of Raney's evidence it would have been very proper to do so, because a blow to a one-legged man's crutch might well be regarded by the jury as an act of provocation".

It is to say the least difficult to reconcile this statement with either Alexander or Lesbini, and it must be regarded as clearly wrong in the light of the decision in Bedder,[212] in which the House of Lords held that it was correct to regard as irrelevant the impotence of the offender, when the provocative incident relied upon was the jeering of a prostitute at this affliction. Furthermore, in the interim between the decisions, the House had on two occasions emphatically restated the view that the reasonable man must be treated as though he had no distinguishing features whatsoever.[213]

In Bedder,[214] Viscount Simonds L.C. stated the objections to deviating from the strictness of the reasonable man test.

> "It was urged on your Lordships that the hypothetical reasonable man must be confronted with the same circumstances as the accused, and that this could not fairly be done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the 'reasonable' or the 'average'

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212. [1954] 1 W.L.R. 1119.

213. In Mancini [1942] A.C. 1; and to a lesser extent in Holmes v. D.P.P. [1946] A.C. 588.

214. [1954] 1 W.L.R. 1123.

> or the 'normal' man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value."

(iii) Present New Zealand Law

Undaunted by these remarks, the New Zealand Parliament has attempted to give some effect to individual idiosyncracies by providing that conduct is provocative if

Section 169(2)(a) "In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control".

That Bedder was uppermost in the minds of the reformers is evidenced by the fact that the Hon. J.R. Hanan, in the House of Representatives, actually referred to the case by name.[215] There can be no reason to doubt that, prior to 1961, that case would have been decided in the same way in New Zealand.

Shortly after the legislation came into effect, the Court of Appeal in McGregor[216] took the opportunity to indicate in reasonably specific terms the way in which the new provisions should be construed. In so far as no peculiarities were asserted by counsel to constitute "characteristics", what was actually said must be regarded as obiter dictum. The Court was also at pains to point out that its analysis was not intended to be exhaustive, and that it was speaking in general terms only.

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215. N.Z. Parliamentary Debates, Vol.328, p.2681. Further evidence that Bedder was the main target of the legislation is the fact that virtually the entire section on provocation in Sir George Finlay's Report is devoted to discussing the case and its ramifications.

216. [1962] N.Z.L.R. 1069.

Nevertheless, what was said there remains the only useful[217] judicial comment on the way in which the Section is likely to be interpreted when problems arise, and for this reason, the case is of considerable importance.

Underlying the Court's approach is the view that, where persons are afflicted by "characteristics", their ability to control their behaviour is diminished or impaired, and it is for this reason that the legislature has included them as relevant considerations. Thus, it is said that

> "If the phrase 'but otherwise' were construed to mean 'in other respects' then the test of the power of self-control of an ordinary man would remain unaffected".

Instead, the Court interpreted the words to mean "save in so far as" the power of self-control is weakened by a "characteristic". This would clearly incorporate any peculiarity which diminished the offender's self-control, and for this reason, the Court then instanced several such peculiarities which would not qualify.

Sir Francis Adams has strenuously criticised this basic premise, and contended that it

> "confessedly rejects the obvious primary meaning of the words 'but otherwise' and appears to give no force to them whatever". 218

With respect, the words are given some force, but it is conceded that it may not be that intended by the legislature. In the learned author's submission,

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217. In Millar (1971) unreported, C.A. 96/71, it was argued that the offender suffered from a "characteristic". This was rejected by the Court, which did not, unfortunately, summarise the evidence advanced for the offender, it being stated simply that "the facts in this case do not come anywhere near the legal requirements in a case like this."

218. Adams; para. 1265, 344.

> "The words 'but otherwise' really dominate the meaning, and make it clear that the offender's characteristics are not to be taken into account in so far as they may affect his power of self-control".

Instead, the relevance of characteristics is that they heighten an individual's sensitivity or susceptibility to provocation.

At first sight, these objections seem to be little more than a verbal quibble. Conceptually, a heightened susceptibility to provocation and a diminished power of self-control seem to be opposite sides of the same coin. But to begin with, the approach advocated by Sir Francis has the considerable merit that it pays more heed to the actual wording of the Section. In addition, the Court had to reconcile with its approach the fact that the legislature clearly intended to retain as the test of sufficiency the power of self-control of an ordinary man. Having conceded that this is diminished by characteristics, it is then forced to limit such characteristics, a task rendered the more difficult by the fact that

> "The legislature has given no guide as to what limitations might be imposed". 219

In so doing, no attempt can be made to restrict the limitations to those implicit in the use of the word "characteristics", and some traits or dispositions are excluded even though prima facie, they appear to constitute characteristics. Once the start has been made in such an exercise, there is no logical stopping place. As Sir Francis puts it,

> "There appears to be no warrant for imposing any limitations on the meaning of 'characteristics', save and except what the word itself implies, viz., that they must be characteristics of the offender and not merely transitory or temporary".

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219. [1962] N.Z.L.R. 1069, 1081.

In its interpretation of "characteristics", the Court stipulated what may be considered, what may not be considered and finally imposed the limitation that the provocative conduct or words must in some way be directed at the characteristic which the offender seeks to invoke. Each aspect will be considered in turn.

A characteristic may be either physical or mental, or a matter of colour, race or creed. This rejects the distinction, advocated by counsel in Bedder,[220] between physical and mental peculiarities. It is respectfully submitted that the decision of the Court is correct, and obviates what might have been the very difficult task of distinguishing one from the other. Nor is there any logic behind the proposed distinction, and as the House pointed out, it ignores the

> "fundamental fact that the temper of a man which leads him to react in such and such a way to provocation is, or may be itself conditioned by some physical defect".

In addition, the characteristic must constitute "part of the individual's character or personality", and could not therefore be something temporary or transient. This is implicit in the use of the word "characteristic", but whilst the propriety of this interpretation is in no sense challenged, it is suggested that its application in a given situation may be a matter of some difficulty. Permanence and transience are relative, and the Court, apart from ruling out self-induced intoxication, gives no real hints as to the time span envisaged. Would pregnancy, or a broken leg necessitating the use of crutches qualify? And as Brown points out,[221] the more

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220. [1954] 1 W.L.R. 1119, 1123.

221. Brown; "Killings Non Sedato Animo" (1962) N.Z.L.J. 489.

permanent the characteristic, the greater the period of time the offender has had to come to terms with his affliction. Finally, it is said that the characteristic must be something of sufficient significance to make the offender different from the ordinary run of mankind. If the Adams approach is adopted, it is not entirely easy to see why this limit should be imposed. It must be assumed that the standard envisaged by the "ordinary run of mankind" is no more than a collection of the ordinary or reasonable men created by the common law. Thus, any deviation from this would seem to be a "characteristic", and Sir Francis would include all the idiosyncracies of the man in the dock.[222] In practice, the characteristic invoked is likely to be significant, and the law virtually assumes that it will be by the requirement that the provocative incident be directed at the characteristic which it is sought to introduce.

Conversely,

> "a disposition to be unduly suspicious, or to lose one's temper readily will not suffice, nor will a temporary or transitory state of mind such as a mood of depression, excitability or irascibility. These matters are not of sufficient significance or not of sufficient permanency to be regarded as characteristics which would enable the offender to be distinguished from the ordinary man".

Several features of this dictum require comment. It may be noted that the disposition to lose one's temper readily is excluded from consideration for the express reason that it is not sufficiently significant or permanent. The "unusually excitable or pugnacious individual" referred to in Lesbini[223]

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222. The learned author specifically challenges the Court's exclusion of mental deficiency or weakmindedness, and would no doubt also disagree with the Court's reference to "undue suspicion".

223. [1914] 3 K.B. 1116.

is excluded on the same grounds. With respect, although the conclusion may be unexceptionable, the reasons are scarcely convincing. The psychopath, surely, suffers from a condition which is significant enough, and his condition may be life-long. Again, it is submitted, the approach advocated by Sir Francis demonstrates its superiority; short-temperedness, excitability and exceptional pugnacity are in effect synonyms for lack of self-control, and the reason why such traits should be excluded from the benefit of the defence is not that they cannot be called "characteristics", nor that they are too transient or insignificant, but simply that the Statute requires that persons with these characteristics be treated as though they had the power of self-control of ordinary men.

One important practical limitation is that

> "there must be some real connection between the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words or conduct must have been exclusively or particularly provocative to the individual because, and only because, of the characteristic. In short, there must be some direct connection between the provocation or conduct and the characteristic sought to be invoked as warranting some departure from the ordinary man test".

This prevents the offender from placing reliance on those many factors whose real importance is that they diminish his general power of self-control. Thus, tiredness, a pain-causing illness and pregnancy would be ruled out. Interestingly enough, this would mean that Alexander,[224] Lesbini[225] and Smith[226] would all still be decided in the same way, a fact

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224. (1913) 23 Cox C.C. 604.

225. [1914] 3 K.B. 1116.

226. (1914) 11 Cr.App.36.

which may well cause the Court of Appeal to reconsider its exclusion of feeble-mindedness were such a characteristic to be singled out for special attention from a provoking victim. It may also be noted that the practical importance of this limit is greatly magnified under the Adams approach, since the man in the dock, having been invested with all his idiosyncracies, is then stripped of them all save those specifically referred to.

Finally, the Court has to some extent left open the problems caused by racial characteristics. This subject has already been the occasion of voluminous comment,[227] and it is not proposed to explore it in depth here. One point is clear enough. Where comment is directed at the race or colour of the offender, he is no longer to be treated as though he did not possess such characteristics at all. Greater difficulty is caused by the fact that it is frequently suggested that some races are more excitable than others, and that some races, particularly Polynesian, tend to brood about their grievances before reacting. By what standard is the conduct then to be judged.

The mere fact that a person is excitable is said by the Court to be irrelevant. Similarly

> "it would not be sufficient for the offender to claim merely that he belongs to an excitable race,

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227. See generally Marsack, "Provocation in Trials for Murder" [1959] Crim.L.R. 697. Howard; "What Colour is the 'Reasonable Man'?" [1961] Crim.L.R. 41. Morris and Howard, 93 et seq., Brown, "The Ordinary Man in Provocation" (1964) 13 I.C.L.Q. 203. And see Cannon [1963] Crim. L.R. 748, 759. For consideration by the Courts see Latoatama [1954] N.Z.L.R. 594, 604 and King [1965] 1 Q.B. 443; [1964] Crim.L.R. 133.

> or that members of his nationality are accustomed to resort readily to the use of some lethal weapon. Here again, the provocative act or words require to be directed at the particular characteristic before it can be relied upon."

This seems to suggest that if a person is a member of such a race, and if that race is referred to, it may be taken into account, an approach which has much to commend it in terms of humanity and common sense. But it is, with respect, fraught with analytical difficulties. Race and excitability are two separate characteristics. Must both be referred to, or is it sufficient that one be referred to only? And for that matter, why should a person excitable by temperament be at a disadvantage by comparison with a person excitable by race?

Slightly different considerations apply in the case of the slow-burning temperament. Adams would include this as a "characteristic", since it is an idiosyncracy of the offender. It is arguable that the Court of Appeal may not do so, but regard it instead as a peculiar way in which self-control is lost. The point is important because, if it is treated as a "characteristic", the offender would not be permitted to rely on it unless some reference were made at least to his race, even though he was confronted by the most provocative of conduct. For this reason, coupled with the fact that the legislature may well have deleted reference to the time element specifically to cater for this problem, the slow-burning temperament should not be treated as a "characteristic" and subject to the limitations which this implies.

D) The Provocative Incident

1. Introduction

In the majority of cases so far dealt with, little

difficulty has been occasioned by this third essential element of the defence of provocation. Coupled with this is the fact that the elements are, like the familiar triumvirate of duty, breach and damage in the law of negligence, closely interwoven, and for these reasons, its separate examination has been deferred until last. Generally, it is both necessary and sufficient that the conduct of the victim satisfied the first two tests, viz. that it in fact caused the offender to lose his self-control, and that it might have caused an ordinary man to do so in the circumstances. But the question arises as to whether there are any other limits as to the sort of incident which may amount to provocation. Indeed, to stretch the problem to its outer limits, the question may be asked whether there must necessarily be any incident at all, or whether it is sufficient that the offender merely believed that something had occurred which would satisfy the other two tests.

2. The Common Law

Welsh[228] has frequently been criticised because of the limits within which it confined the defence. But the reasonable man test, once it had been fully enunciated, was potentially capable of freeing the law from the confines of the Common Law. This point is illustrated by Rothwell,[229] decided two years later, in which the jury was told by Blackburn J. that

> "if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, was thereupon to kill her, it might be manslaughter".

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228. (1869) 11 Cox C.C. 336.

229. (1871) 12 Cox C.C. 145.

This involved extending the law in two ways. Words alone were for the first time treated as being potentially provocative, and in consequence, in the circumstances, the requirement of "occular inspection" of the adultery[230] was dispensed with. What is more important is that, in creating these extensions, Blackburn J. expressly invoked the reasonable man test. The rule thus created that confessions of adultery may amount to provocation was applied in Jones.[231]

Rothwell, and to a lesser extent Jones, were decided at a time when the judges readily left the question of sufficienty to the jury. Unfortunately, they proved to be something of a false spring; the creative potential of the reasonable man test was never fully nurtured by the Courts, and it had to be replanted, in England at least, by Statute. In Palmer,[232] the Courts declined to extend the rule established in Rothwell to a sudden confession of unfaithfulness by the fiancée of the offender, and in Greening,[233] it was held that the relationships between husband and wife on one hand, and de facto spouses on the other were "entirely different". No mention is made of Welsh or of the reasonable man test in either case.

Once these cases had been decided, the old rule that words alone would not amount to provocation, which had been momentarily checked in Rothwell, and could have been halted altogether had Welsh been fully developed, gained fresh impetus. In

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230. Pearson (1835) 2 Lew. 216; 168 E.R. 1133.

231. (1908) 72 J.P. 215.

232. [1913] 2 K.B. 29.

233. (1913) 23 Cox C.C. 601.

Birchall,[234] the offender, who was arguing with his wife over her suspected infidelity, was called a "coward" by his brother, who was also the object of the offender's suspicions; it was held that the killing was murder because, inter alia, the provocation was by words alone. Palmer was followed in Alexander,[235] in which the de facto wife of the offender told him that she was going to leave him and live with another person, and when in Phillis,[236] the offender sought to persuade his errant wife to return to him, to be contemptuously told that he should go and live with someone else, the Court of Criminal Appeal upheld the trial judge's ruling that there was no evidence of provocation.

By the time that Ellor[237] was decided, it was far too late to attack these decisions on the basis that they were inconsistent with Welsh. The fact that the law in this instance might override the realities of the provocative effect of words is illustrated by an exchange between counsel and the Court of Criminal Appeal. Counsel, W.N. Stable, urged that

> "where provocation arises from words and the jury think that because of such provocation an ordinary and reasonable man would be deprived of his self-control, it is open to them to return a verdict of manslaughter".

Lord Reading C.J. countered:

> "If that is true, an angry word used may be sufficient to deprive a man of his self-control. The law of England has always been that it is not sufficient to

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234. (1913) 23 Cox C.C. 579.

235. (1913) 23 Cox C.C. 604.

236. (1916) 32 T.L.R. 414.

237. (1920) 15 Cr.App.R. 41.

reduce the charge from murder to manslaughter".

If these decisions were not enough to overrule Rothwell, Blackburn J.'s ruling most certainly received its quietus from the House of Lords in Holmes v. D.P.P.[238] Viscount Simon sounded a note of hope by recognising that

> "one can imagine in these days at any rate, words of a vile character which might be calculated to deprive a reasonable man of his customary self-control even more than would an act of physical violence".

However, the House also said that this would occur only

> "in circumstances of a most extreme and exceptional character".

Suffice it to say that the Courts themselves never elaborated on what these circumstances might be. It was left to the legislature, upon the recommendation of the Royal Commission on Capital Punishment,[239] to enact that either deeds or words might be provocation provided that, in the opinion of the jury, they satisfied the reasonable man test.[240]

3. The New Zealand Law

When the Criminal Code Bill Commission Report was presented,[241] the Common Law was in a state of uncertainty. The Commissioners, (one of whom had been the trial judge in Rothwell),

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238. [1946] A.C. 588, 601.

239. Cmnd. 8932, at p.56 para.152. The Commission rejected a submission that, liberally interpreted, the limits placed in Holmes would cater for all situations in which a reasonable man might commit homicide in response to words alone, largely on the grounds that the issue would rarely if ever be placed before juries.

240. See Simpson [1957] Crim.L.R. 815 and Fantle [1959] Crim.L.R. 584. These would almost certainly have been decided differently had the Homicide Act, 1957 not been passed. See Eddy; "The New Law of Provocation" [1958] Crim. L.R. 778.

241. 1878-9 [c.2345] XX - 169, p.24.

reported that

> "There is no definite authoritative rule on the subject, but the authorities for saying that words can never amount to provocation are weighty. We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow."

It was no doubt to give effect to this view that the Criminal Code Act, 1893 provided in Section 165(2) that "any wrongful act or insult" might constitute a legally relevant provocative incident.

That this provision ameliorated the New Zealand law by comparison with the Common Law is quite certain. However, the extent to which it did so is more problematic, and it is by no means clear that the sufficiency of the incident, when it took the form of words alone, was adjudged solely in terms of the ordinary man test. In the second edition of Garrow,[242] the opinion is expressed that

> "In all these cases[243] the question of provocation would, under New Zealand law, be one for the jury to decide on the facts in each case".

This passage is replaced in the following edition by the statement that

> "intercourse between an engaged girl and a man other than her fiancé is not wrongful within the meaning of the section and would not constitute provocation for murder by her fiancé". 244

In the absence of decided cases, it is not possible to express an opinion as to the correctness of this assertion. If it is

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242. Garrow; "The Crimes Act, 1908" 2nd ed. by Jas. M.E. Garrow (1927) p.98.

243 Rothwell, Greening, Birchall, Alexander, Ellor and Phillis are referred to in this context.

244. "Garrow's Criminal Law in New Zealand" 3rd ed. by C. Evans-Scott (1950) p.118.

correct, then a fortiori, it is difficult to see how the confession of infidelity by one non-spouse to another could be treated as "wrongful". Indeed, it is arguable that although a confession of adultery may convey information which a recipient spouse finds distasteful, it cannot be described as an "insult" at all, and it may well be that Rothwell would not have been good law in New Zealand, and that Greening and Palmer, at least, would have been decided in the same way here.[245]

These doubts have been allayed by the changed phraseology of the Crimes Act, 1961. The words "wrongful act or course of conduct, or any insult" were used to describe the provocative incident in the Crimes Bill, 1957, but this was later amended along the lines of the Homicide Act, 1957 (U.K.) to provide that

"anything done or said may be provocation" [246]

provided that it satisfies the other criteria. Henceforth, it would no longer be open to a trial judge to rule that there was no evidence of provocation on the ground that the incident complained of consisted of words alone. The changes wrought are illustrated by Anderson,[247] in which the facts gave rise to an inference that the de facto wife of the offender confessed that she had been unfaithful. It was expressly conceded by the Solicitor-General that, apart from the question of sufficiency, such an incident could now be provocation.

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245. Cf. per contra Taylor [1948] 1 D.L.R. 545. Although, there the confession was accompanied by a slap, and was made in a way which might be interpreted as insulting.

246. Section 169(2) of the Crimes Act, 1961.

247. [1965] N.Z.L.R. 29.

4. Indirect Provocation and Misdirected Retaliation

(a) The Problems Posed

Generally, it may be said that provocation consists of some act or series of acts done by the dead man to the accused.[248] But incidents may occur which satisfy the general definition of provocation contained in Section 169(2), but which either were not done to the victim, or not done to the offender. The offender's aim may be astray, or he may mistakenly think his antagonist to be A when in fact he is B. It may be that nothing is done or said at all, but the offender, suspecting or honestly believing the worst, kills before the true position is known to him. He may misinterpret either the conduct or the remarks of his victim, and attach to them unintended connotations. And what is the position where the offender, already riled by the behaviour of one person is then made the object of provocative conduct by another, conduct which would not in itself satisfy the ordinary man test? The third person may, in such a situation have done nothing to the offender at all. Finally, a problem is raised where one person acts in such a way as to provoke A, and his conduct has the incidental and unintended effect of provoking B.

All of these situations have one feature in common, which is that, vis-a-vis the offender, the victim cannot be said to be the author of his own destruction. Can it be said in such circumstances that the offender was "provoked", or acted "under provocation"? According to Howard,

"The idea underlying the doctrine of provocation is

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248. It was so described by Devlin J. in Duffy [1949] 1 All E.R. 932. In the case (unnamed) with which the learned judge was concerned, these conditions were in fact satisfied.

> that it is unjust to convict D of the most serious form of homicide if V's death is partly his own fault". 249

There is no evidence that the Courts embark on any subsidiary enquiry into the part played by the victim in his own demise; indeed if the law is examined from the point of view of the fault of the victim, a complicated web of conflicting trends and tendencies is to be found. At times, the suggestion that such fault might be relevant is eschewed; but in some cases, although the lack of fault is not elevated into an articulate premise upon which the Courts proceed, it is submitted that it may be found lurking not very far beneath the surface of the legal niceties.

Until 1961, no mention of these problems was made in the New Zealand legislation, and no case is reported in which they were considered. Although it is conceivable that the legislature intended that these questions should be dealt with solely in terms of the definition of provocation contained in Section 184 of the Crimes Act, 1908, it is almost certain that the Common Law would have prevailed. However, in 1961, a new sub-section, Section 169(6) was included, which provided that

> "This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person".

Two problems of interpretation arise in particular. Do the words "was given" prevent the offender from invoking the defence where the conduct of the victim is directed at a third

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249. Howard; 2nd ed. p.84. In fairness, it should perhaps be added that this is not a theme which the author develops.

person? Second, is the requirement that the provocation be given by "the person killed" intended to be exhaustive, or is it the law that, in those rare cases in which the victim in no way contributed to his own death, the ordinary man test still prevails as the test of sufficiency? According to the explanatory note to the 1959 Crimes Bill, the sub-section is "declaratory of the case law". It is intended to examine each question in the light of this case law.

(b) "Was given" by the person killed: Indirect Provocation

In two of the earliest reported cases, the fact that the victim had directed his conduct at another person did not prevent a manslaughter verdict being reached. In Anon,[250] the offender went to the aid of a friend who had become involved in a quarrel over a game of bowls. And in Royley,[251] the offender was informed that his son had been beaten in a fight with another boy. He immediately took up a "cudgel", ran a considerable distance, and slew his son's adversary. Probably, as Turner comments,[252] too great a reliance should not be placed on these cases,[253] although in the case of Huggett,[254] at least one of the judges cited the Anon case in support of the proposition that an unlawful imprisonment may be provocat-

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250. (1611) 12 Co.Rep. 87; 77 E.R. 1364.

251. ibid.

252. Russell; 12th ed. p.531.

253. Foster confesses that he finds the case"a very extraordinary one as Coke reports it, the provocative incident being "a disaster slight enough, and very frequent among boys". He prefers the account of Croke, which, he suggests, shows that because the fatal blow delivered was a "single stroke" with a "small cudgel" was most probably accidental. See Foster, 294-5.

254. (1666) Kel. 59; 84 E.R. 1082.

ion to a bystander. Huggett and three others had gone to the "rescue" of an unknown person who was being pressed into service against the Dutch, and who was not himself protesting. The arrest was unlawful, and in the ensuing melee, Huggett killed one of the persons arresting. When the judges were asked for a preliminary opinion, they ruled that the case was manslaughter only. Kelyng himself considered the case murder, and distinguished the Anon case by pointing out that the person arrested was making no protest or attempt to escape, and because "they who medled were no friends of his". Certainly, the facts give ample cause for suspicion as to the genuineness of Huggett's wrath. It appears that the judges, having been persuaded by Kelyng's arguments, then ruled that the case was murder, but compromised by imposing a penalty of eleven month's imprisonment only. However, in Tooley,[255] it was decided that the unlawful imprisonment of a third person could be sufficient provocation. Five of the judges thought the case murder, and sought to draw a distinction between cases in which the third party was a relative or a friend, and cases in which he was a stranger; this did not, however, commend itself to the majority which included Lord Holt C.J. on the grounds that it was "not to be met with in our books".

Foster's criticism of the case is sarcastic and trenchant. He contrasts the situation where provocation is given by words alone to the offender himself, pointing out that

> "affronts of that kind pierce deeper, and stimulate the veins more effectually, than a slight injury done to a third person". 256

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255. (1709) 2 Ld. Raym. 1296; 92 E.R. 349.

256. Foster, 312.

He also makes the point that, although indignation might be aroused by the sight of a wrongful arrest, this is the product of cool reflection and reasnn rather than instinct or human infirmity. But Foster does not rule out altogether the possibility that provocation given to a third person may also be provocation to the offender.

The problem does not appear to have arisen again in the Reports for more than a century, when in Harrington,[257] Cockburn, C.J. allowed the defence to go to the jury when the provocative incident consisted of an attack on the daughter of the offender by her husband. There are, however, two relevant Commonwealth authorities. In Mouers,[258] the deceased attacked a young girl, whose companion ran to inform the offender of what had happened. Mouers immediately went to the scene and shot the deceased. It was held by the Court that there was no evidence of provocation, principally because the offender had not actually witnessed what had occurred between the deceased and the young girl. Finally, the question arose for consideration in Terry,[259] in which provocation was offered by the deceased to the sister of the offender, who was also the wife of the deceased. Pape J. ruled that there was evidence of provocation fit to place before the jury. In so doing, he drew an analogy with cases of the defence of one's relatives, but he expressly left open the

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257. (1866) 10 Cox C.C. 330. But see "Roscoe's Law of Evidence" 14th ed. by H. Cohen (1921) p.861 where it is said that "It was held by Rolfe B. that a blow given to defendant's wife would afford the same provocation as a blow given to himself, so as to reduce [murder] to manslaughter. Rodgers (1842) (earlier editions of this work.)"

258. (1921) 57 D.L.R. 569.

259. [1964] V.R. 248.

question whether the operation of the doctrine was, or should be, confined to relatives. He did, however, insist that the offender must have been present when the provocative incident occurred, a restriction which may be explained by the fact that words alone could not constitute provocation according to Victorian law.

In all of these cases, it may be said that the victim is at fault in two respects; he is doing something to someone other than the offender which would be provocation to that other person. It need not be shown, however, that he intended to provoke the offender, although it would seem that in each case, he was at least negligent in that respect. Both of these elements are not, however, necessary to the operation of the defence, as is shown by the adultery cases. Smith and Hogan suggest that, even here, the case

> "might also be considered as one where something is 'done to' D by the guilty pair. At least they are committing a matrimonial offence against him". 260

But the conduct could not be provocative to the offending spouse, and in Fisher,[261] in which Park J. said that the adultery rule could possibly be extended to the situation where the victim had committed an unnatural act with the son of the offender, there is no evidence that the act was anything other than consensual. Again, however, Park J. insisted that such an extension could only be contemplated where the offender had actually witnessed the incident.

To summarize thus far, it is submitted that it may be

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260. Smith and Hogan 2nd ed. p.206.

261. (1837) 8 C. & P. 182.

said that the provocation "was given" by the person killed in each of the cases considered, whether that conduct was provocative to the third person or not. It is also submitted that the question whether the person attacked or insulted is a relative of the offender

> "is a relevant factor when the question whether an ordinary man would be likely to lose his self-control as a result of seeing the provocative incident is being considered by the jury". 262

Similar comments may be made of the apparent Common Law rule that the offender must have been present when the provocative incident occurred, although it may be that, where the offender was not present, there will also be a time lapse between the incident and the retaliation. But it is submitted that, to elevate either of these two factors to necessary preconditions may conflict with the provisions of the Crimes Act 1961, itself, and where this occurs, it is the provisions of the Act which must prevail.

(c) "by the person killed": Misdirected Retaliation

In McGregor,[263] it was argued for the offender that the provocative words or deeds referred to in Section 169(2) could emanate from any source, and need not necessarily come from the victim himself. Counsel submitted that the terms of Section 169(6) were ambiguous, and at least consistent with this submission. The Court of Appeal replied;

> "We cannot agree. In our opinion the subsection makes quite plain what in any event is inherent in the use of the word 'provocation', namely that the law shows a measure of indulgence to a person who kills another who has provoked him. It may well

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262. [1964] V.R. 248, 251 per Pape J.

263. [1962] N.Z.L.R. 1069, 1080.

> be that earlier happenings between the appellant and [deceased] could be taken into account in determining whether a subsequent comparatively trivial act of provocation on the part of [deceased] could cause slumbering fires of passion to burst into flame, but in the present case [deceased] did or said nothing to arouse the passion of the appellant...."

In other words, it would seem that the policy of the law is that the actual incident which sparks the offender's passion must be something done by the victim. If this statement is definitive of the New Zealand law, then the Crimes Act, 1961 did rather more than merely state the case law. Further, the present English law which requires that the issue be judged from the point of view of the offender rather than that of the victim, appears to be more advantageous to the offender, and more consistent with the general principles of criminal responsibility.

It is not entirely easy to find reasons why the defence should be limited to those cases in which provocation did move from the person killed, particularly in those situations in which it is conceivable that an ordinary man would have behaved as the offender did. It is submitted that the only reasonable explanation for this departure from the ordinary man test is that the victim is in such circumstances not at fault.

Even so, this rationale is not as Howard would suggest, consistent throughout the law. Thus, the Crimes Act, 1961 itself provides for exceptions where the offender "by accident or mistake" kills someone other than the person provoking. This is consistent with the case law. In Williams,[264] Gross,[265] and Porritt[266] it was decided that the offence was manslaughter

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264. (1639) Jones W. 432; 82 E.R. 227.
265. (1913) 23 Cox C.C. 455.
266. [1961] 1 W.L.R. 1372.

only when the person killed was an innocent bystander. Indeed, in the last case, the person to whom provocation was offered was in fact the person killed. Cases in which the victim is killed as a result of mistaken identity are rare, the only commonly cited example being Brown,[267] in which the victim was thought to be one of a group of keelmen who had attacked the offender. In these cases, it is difficult to see how it can be said that the victim is at fault. It should also be pointed out that where the offender makes a mistake, not as to the identity of the persons provoking and killed, but as to the circumstances by which he is confronted, the issue is judged from his point of view rather than in terms of what the victim intended by his conduct. Glanville Williams asserts that

> "There seems to be no doubt that a mistaken belief in provocation is equivalent to actual provocation. The mistake is a defence to the same extent as if the facts supposed were true". 268

As the chief authority for this proposition, he cites the case of Letenock,[269] in which the offender, a drunken soldier, mistakenly thought that his corporal was about to attack him. The Court replaced a verdict of murder with one of manslaughter. Although the Crimes Act, 1961 does not specifically refer to this problem, it is submitted on general principle that this case applies in New Zealand, and that if an offender mistakenly

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267. (1776) 1 Leach 148.

268. [1954] Crim. L.R. 740, 752. There is some doubt as to whether the mistake need be objectively reasonable. Williams argues that it need not, but in other contexts the Courts have consistently refused to adopt a subjective approach, and the question must be regarded as an open one.

269. (1917) 12 Cr.App.R. 221. And see the submissions of Counsel in Millward (1931) 23 Cr.App.R.119.

believes that a provocative incident has occurred, and loses his self-control and kills, when an ordinary man would have lost his self-control, he should not be excluded from the benefit of the defence whether the person killed is in any way at fault or not.

Be that as it may, the ruling of the Court in McGregor[270] is consonant with what was said in Simpson.[271] The offender was a returned soldier whose wife had been in the habit of returning home with other men in his absence. She also spent the housekeeping money on drink, and neglected their two year old child who was suffering from water on the brain. When the offender returned one day to find his wife absent, he killed his son with a razor. On appeal, the verdict of murder was upheld on the grounds that the defence applies only where provocation is given by the deceased. However, the correctness of this ruling has been doubted, and the decision has been explained on other grounds.[272] To begin with there was nothing in the nature of an assault by the wife on the offender, which was required by law at the time. In addition, the defence was really attempting to dress up as provocation a killing which in reality proceeded from other motives, and, however understandable those motives may have been, they could not be treated as though they proceeded from provocation.

If Simpson created such a rule, it seems to have been extended slightly in the case of Hall.[273]

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270. Supra n.263.

271. (1915) 84 L.J.K.B. 1893.

272. See e.g. Morris and Howard; 93n. and O'Regan; "Indirect Provocation and Misdirected Retaliation" [1968] Crim.L.R. 319, 321.

273. (1928) 21 Cr.App.R. 48.

The case for the Crown was that the accused had killed one person while angered by provocation received from another. There was, however, a conflict of evidence, and the offender alleged that the offender was one of a party which had earlier attacked him. On the basis that the offender's story might be true, the Court of Criminal Appeal substituted a verdict of manslaughter for one of murder. Any extension of the rule in Simpson is slight, because it is implicit in the offender's argument that the deceased had earlier afforded him provocation.

A more troublesome situation arose in the Victorian case of Scriva (No.2).[274] The offender witnessed his child being run over, and, as he thought, killed, by a recklessly driven car. This sight moved him to attack a passenger in the car, whereupon a bystander intervened and was stabbed to death. It was held by a majority in the Full Court that there was no evidence of provocation because no ordinary person would have behaved as the offender did. In the light of this ruling, it became unnecessary for the Court to decide what the rules as to misdirected retaliation were, but the question was nevertheless considered briefly. It was considered that, although the doctrine was not confined to those cases in which the provocation was actually given by the victim, the victim must nevertheless be one of a party giving the provocation, a person whom the offender killed by mistake or one of a party whom the accused reasonably believed to be giving provocation. Finally, the doctrine might apply where the victim was killed by accident, when the offender intended to kill another falling

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274. [1951] V.L.R. 298.

within these categories.

Before commenting on this analysis, it may be as well to point out a different problem arising from Scriva, and which is present to a lesser extent in McGregor. In Scriva, it seems tolerably clear that the offender was already enraged at the time when the bystander intervened. However, it would appear that when the Court considered the question of sufficiency, it examined the conduct of the victim as though it were in some way an independent incident. Further, the Court laid considerable emphasis on the worthy motives with which the hapless bystander had acted. But in fact, the victim had done something which directed the attention of the offender towards himself. Similarly in McGregor[275] the victim had done something by which the offender said he had been angered. Although it was expressly mentioned by the Court of Appeal that it was not contended that

> "the invitation intended to the appellant's father was given for the purpose of annoying the appellant",

the fact remains that the offender interpreted this as one further blow struck in the continuing feud between himself and his victim. In both cases, then, the victim had done something to annoy the offender, and which in some way contributed to the offender's loss of self-control.

In ruling as it did that the provocation, to be efficacious, must move from the victim, the Court of Appeal clearly appeals to the meaning of the word provocation.[276] What the Court appears to be saying, it is submitted, is that conduct is

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275. [1962] N.Z.L.R. 1069, 1073.

276. Supra n. 263.

provocative or not according to its author's intentions. With respect, although the intention of the person provoking is certainly one factor to be taken into account, it is not the sole criterion by which the provocative tendency of conduct is judged. Moreover, it has already been argued that the law in effect concedes this point by treating as provocation, conduct which was at most negligent in this respect.[277] Surely at least one of the factors which we normally treat as a criterion of provocation is the way in which the offender himself actually reacts to what is said or done. Thus, if a person were to slap his small child for constantly spilling its milk, there would be no objection to saying that he was "provoked" into doing so, or that he acted "under provocation", despite the child's obvious lack of guilt. Clearly enough, if the victim acts with the deliberate intention of riling the offender, the retaliation of the latter is the more ordinary, but it is submitted that this is not the only or even the main criterion according to which we characterise his actions as provocative.

For these reasons, it is submitted, the analysis of the Court of Appeal in McGregor is defective. Moreover, it is arguable that the question could have been treated otherwise consistently with the present Crimes Act, which provides in Section 169(2)(a) that the question of sufficiency is to be decided "in the circumstances of the case". Thus, the argument would proceed, although initially the conduct of the victim did not move the offender to kill, the later

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276. Supra n.263.

277. Supra p.146.

circumstances of the conduct of the father must be considered when the question of sufficiency is being determined. It is, to say the least, highly unlikely that, even considering the matter in this way, it could be said that an ordinary man would have behaved as McGregor did, but the correctness of the result should not be permitted to obscure the fact that it was arrived at by a questionable route. Similarly, should a case such as Scriva arise in New Zealand, it is submitted that one of the "circumstances of the case" which ought properly to be taken into account in deciding the question of sufficiency is the fact that the offender is already enraged by something said or done to him by a third person.

(d) Conclusions

This examination of the cases shows that there may still be some limits on the operation of the ordinary man rule in New Zealand when the provocation is given by someone other than the person killed. Yet it is impossible to find any consistent rationale by which these limitations might be explained. Even in the various situations envisaged in Scriva, the degree of fault displayed by the victim ranges from the completely innocent to the wilfully antagonistic. It is not contended that the question of fault is entirely irrelevant. Rather, it is submitted that the present categorisation places too great a premium on the participation of the victim in some cases but not in others, and is an unnecessarily complicated way of dealing with the sufficiency of a provocative incident.

An alternative method is provided by the present English law. In Twine,[278] the conduct of the girlfriend of the offender

278. [1967] Crim.L.R. 710. The facts of which appear more fully in Smith and Hogan, 2nd ed. p.206.

caused him to lose his self-control and to strike and kill the man she was with. It appeared that, not only did the victim not intend to insult or provoke the offender, but he was entirely unaware of the offender's presence. Notwithstanding this, Lawton J., having decided that there was evidence from which it might be inferred that the offender had lost his self-control, left it to the jury to say whether or not the offender was provoked enough to make a reasonable man do as he did. As the learned judge pointed out, the Homicide Act, 1957 had changed the Common Law on this point, and it may now be confidently asserted that Simpson would be approached differently today.

It is submitted that, having regard to the unnecessary complexity of the present New Zealand law, this example may well merit consideration for the purposes of reform. And just as these difficulties were introduced by the inclusion of subsection (6), they can and should be, obviated by its abrogation. If this were achieved, there would no longer be any limits on the sort of incident which might potentially constitute provocation.[279]

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279. This is subject, perhaps, to the opening words of Section 169(5) of the Crimes Act, 1961, which provide that "No one shall be held to give provocation to another by lawfully exercising any power conferred by law...." There may be some reasons of policy why this should override the ordinary man test, but the purpose of the subsection is obscure. Adams 2nd ed. para.1274 p.346 suggests that lawful arrest or imprisonment would be typical of the powers contemplated, and argues that is to such matters that the provision is mainly or wholly directed. As to unlawful arrest. See Section 170 Crimes Act, 1961.

CHAPTER FOUR

THE BURDEN OF PROOF

A) Introduction

Notoriously, expressions such as "the burden of proof" and "the onus of proof" are used by the Courts and the commentators to convey a multitude of different meanings. For present purposes, however, it is sufficient to distinguish between the persuasive and the evidentiary burdens. The "persuasive burden" connotes the task, (which may be undertaken by either the prosecution or the defence), of establishing a case. More specifically, it governs the question as to who must discharge the task of persuading the tribunal that a killing was murder rather than manslaughter. It also governs the extent to which the tribunal, at the end of the day, must be satisfied. This aspect of the defence of provocation has, in general caused little difficulty.

Unfortunately, the same cannot be said of the evidentiary burden. Briefly, this dictates what factors must be apparent in or capable of inference from the evidence before a defendant is entitled to have the issue which he wishes to raise considered by the tribunal. It also determines who is to decide, as between judge and jury, whether those factors are present. In short, it raises the whole question of the respective functions of judge and jury. That these questions are of considerable importance and complexity is indicated by the fact that it is impossible to explain the substantive law without numerous references to them. Insofar as possible, repetition of what has already been said will be avoided; but the

collation of these points, and the addition of others not already mentioned is necessary to place the present New Zealand approach in some perspective.

B) The Persuasive Burden

Before this century, very little seems to have been written or said about where the onus of proving provocation lay; certainly, there is no case in which the problem was expressly considered. Foster[1] stated that

> "I have already premised, that whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of his jury. The presumption of law is against him, till that presumption is repelled by contrary evidence."

Although no authority is given for this assertion, it does find echoes in subsequent cases. In Thomas,[2] the jury was told by Parke B. that

> "whenever death ensues from violence inflicted by the hand of another, the law presumes, prima facie, that it was murder; and it must be so treated, unless, upon the evidence for or against the accused, the jury are induced to come to a conclusion that the offence is of a less degree".

This shows, at least, that evidence of provocation need not be found exclusively in the evidence given on behalf of the offender. But the expression "induced to come to a conclusion", although it appears to suggest that the jury must believe that the accused was provoked, was probably, in fact, used rather loosely. And in Kirkham,[3] Coleridge J. probably had the evidentiary onus only in mind when he said

> "if you had heard nothing more than simply that the prisoner taking a knife in his hand had stabbed his son

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1. Foster, 290.

2. (1837) 7 C. & P. 817.

3. (1837) 8 C. & P. 115.

> that would have put it on him to clear himself from the charge of murder. The law requires from him and will allow him to shew that there were some mitigating circumstances."

It would no doubt be possible to compile a long list of similarly inconclusive instances. But the matter was not seriously considered by the Courts at all until Woolmington v. D.P.P.[4] Were it not for the fact that the House specifically refers to the question, the case would be of too general application to warrant more than a passing mention. As it is, however, Woolmington's case is highly relevant and provides the basis of the present law relating to the question.

The direction of the trial judge bears a striking similarity to what was said in Thomas and Kirkham; he directed the jury that

> "if the Crown satisfy you that this woman died at the prisoner's hands, then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter".

This was held to be a misdirection. Beginning with the presumption of innocence in favour of the accused, the House then reasoned that earlier authorities, including Foster, and in particular Lord Tindal C.J. in Greenacre[5] were either wrong or must have been referring to the evidentiary onus only; the next step in the process of proof. However, the House took the matter rather further by holding that if all that appeared in the evidence was that the accused killed the deceased, there was evidence upon which the jury may - not, must - find him guilty of murder. To establish that a killing

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4. [1935] A.C. 462.

5. (1837) 8 C. & P. 35.

is murder, the Crown must show that it was accompanied by malice, and

> "malice may be implied where death occurs as the result of the voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

If this was a new approach, the Courts do not appear to have had immediate difficulty in giving effect to it, in the context of provocation, and it was not until six years later in Prince[6] that a verdict of manslaughter was substituted for murder on the basis of a misdirection as to the burden of proof. There, the trial judge had told the jury in general terms that if there was any reasonable doubt, such doubt should be resolved in favour of the prisoner. The main objection was that he did not specifically tell the jury that this was the case even if the explanation given by the prisoner was not accepted. In Mancini,[7] the House of Lords reiterated what had been said in Woolmington, pointing out that when Viscount Sankey had said that the prisoner was entitled to be "acquitted", he meant simply that the prisoner was entitled to the benefit of the doubt. The House also laid emphasis on the fact that it is the overall effect of the summing up which is important; provided that the warning as to reasonable doubt is given, it

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6. (1941) 28 Cr.App.R. 60.

7. [1942] A.C.1.

need not be repeated again and again.[8] However, on subsequent occasions, in McPherson[9] and Cascoe,[10] the Courts have quashed convictions of murder where the trial judge has made no reference in his summing up to the question of where the onus of proof lies in cases of provocation.

As far as New Zealand is concerned, the position was not established with any certainty until Kahu,[11] in which it was argued for the Crown that Woolmington did not apply in New Zealand. The trial judge directed the jury to find the offender guilty of manslaughter if they were "satisfied" that he had been provoked. Counsel for the Crown contended that the question here was to be decided as a matter of statutory interpretation. Since, however, there was no reference to the onus in the Crimes Act 1908, the law in New Zealand remains as it used to be in England prior to Woolmington. The Court of Appeal refused to accept these submissions, and prayed in aid the decision of the Privy Council in Kwaku Mensah[12] which, it said

> "manifests a strong disinclination by their Lordships that the rule as to the burden of proof as enunciated in Woolmington and Mancini has been displaced by legislation".

For this reason, the conviction was quashed and a retrial ordered. In Parker,[13] the Privy Council in fact held that the relevant

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8. See Hodges [1962] Crim.L.R. 385 and Ryder [1964] Crim.L.R. 152.
9. (1957) 41 Cr.App.R. 213.
10. [1970] 2 All E.R. 833.
11. [1947] N.Z.L.R. 368.
12. [1946] A.C. 83.
13. (1964) 111 C.L.R. 665.

legislation had displaced Common law rules as to the burden of proof. However, in Anderson,[14] the Solicitor-General was invited to make submissions as to the correctness of Kahu. For what the Court considered to be "good and sufficient reasons", he declined to argue that Kahu should be reconsidered, and it was accepted by the Court that the position had not been affected by the 1961 legislation. This view was applied in Downey,[15] in which one reason given for the quashing of a verdict of murder was that the trial judge must have given the jury the impression that it was necessary that they should "accept" the evidence of the offender before they could find a verdict of manslaughter.

C) The Evidentiary Burden

None of the foregoing is relevant until the decision has been taken to permit the jury to consider provocation. Common law practice in this respect was stated by Viscount Simon L.C. in Mancini.[16]

> "Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the judge to invite the jury to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence".

The real problem is the meaning of "provocation" in this context. Unfortunately, the Crimes Act 1961 is of little real assistance. Basically, it defines "provocation" as consisting of three elements; something must have been "done or said", which

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14. [1965] N.Z.L.R. 29.

15. [1971] N.Z.L.R. 97.

16. [1942] A.C. 1, 12.

caused the offender to lose his self-control, and which was sufficient to deprive an ordinary man of the power of self-control. It then provides for the respective functions of judge and jury by stipulating that

Section 169(3) "Whether there is any evidence of provocation is a question of law."

Section 169(4) "Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact."

Slightly different considerations apply to each of the three elements, partly because each is of a different logical character. The question whether something was done or said is a question of fact, capable of proof or disproof in the ordinary way. It has earlier been argued that actual loss of self-control is not a question of fact, and the evidentiary difficulties to which this gives rise have already been considered.[17] Finally, the question whether an ordinary man would have lost his self-control is best characterised as one of opinion; and it is over this issue that many of the difficulties associated with the defence arise.

Of the three elements of provocation, the actual occurrence of an incident which caused the offender to lose his self-control is the one which most readily lends itself to proof by direct evidence. But there need not be any such evidence; and although, as Viscount Simon states, the jury should not be invited to speculate, where there is no direct evidence, some

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17. Supra p.57.

degree of speculation is of necessity involved. The extent to which this is permissible is illustrated by a comparison between McLaren[18] and Anderson.[19] In the former, it appeared that the offender had become involved in an altercation after he had approached a group of men. Provocation was not pleaded at the trial, and counsel on appeal suggested that it should have been.[20] In rejecting this submission, Lush J. said

> "This defence had not been suggested before, and if there had been provocation it would have been easy to prove it by calling the appellant; this was not done".

By comparison in Anderson, evidence was given that the offender had become upset when his de facto wife said something to him at a party. No evidence was given as to the "ipisssima verba", and for this reason the trial judge withdrew the issue from the jury. The Court of Appeal held that he should not have adopted this course. Instead, the Court pointed to the circumstances surrounding the offence, including the offender's immediate reaction and his subsequent statement to the police (which was tendered in evidence by the Crown), and concluded that these were sufficient foundation for an inference that the deceased

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18. (1913) 9 Cr.App.R. 107, 109.

19. [1965] N.Z.L.R. 29, 34.

20. It should be interpolated at this point that it is for the judge to say whether there is evidence of such an incident, and the rule which obliges the trial judge to leave provocation to the jury when there is evidence to support it (discussed supra pp.59-61) is also relevant in this context. However Hopper [1915] 2 K.B. 431, in which this duty was first spelled out, was not decided until after McLaren. This rule has recently been reiterated in Cascoe [1970] 2 All E.R. 833, 837 where it is said that "whether the issue is raised at the trial or not, if there is evidence which might lead the jury to find provocation, then it is the duty of the Court to leave the issue to the jury". per Salmon L.J.

had confessed infidelity. The limits to permissible speculation were to some extent set by the Court, which said

> "when the incident which gives rise to the defence of provocation takes the form of words only, then it is necessary that sufficient should be known of what was said or claimed to have been said to enable the Judge to rule whether there is any evidence of provocation to go to the jury.... But we do not think that there is any justification for concluding that the exact words must be known. We are of opinion the Solicitor-General was right when he conceded, as he did, that it was enough if there was sufficient material to enable the Judge, and ultimately the jury, to infer the general content of what was said."

It is submitted that these comments apply, mutatis mutandis, where the provocation alleged consists of something "done" rather than "said". This follows from the fact that there need only be a reasonable doubt in the minds of the jury as to whether or not the offender was provoked. In Lewis,[21] the Court of Appeal said that

> "It is very important, when dealing with a defence such as provocation, to make it quite clear to the jury that they are not under the necessity of deciding what the true facts are upon which the defence rests. It is enough if the evidence raises a reasonable doubt in their minds, as to whether the homicide was, in truth, murder."

Most difficulty is caused by the third element, the ordinary man test. In a large majority of cases in which the plea of provocation failed, it did so because the provocation alleged was thought for one reason or another to be insufficient. Hovering in the background is the question who is to decide, as between judge and jury, the sufficiency of a provocative incident. In the course of its history, the doctrine has run the complete gamut. At one end of the spectrum, provocation was initially treated as being entirely a question of law.[22]

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21. (1962) unreported C.A. 92/62.
22. Supra pp.20-22.

At the other, the Homicide Act, 1957 now confides the issue to the jury alone. For the remainder, the degree of latitude permitted to juries has waxed and waned, creating an uneasy and unstable compromise.

For two reasons, the judges have guarded their powers to make this decision rather jealously. There is, to begin with, the traditional judicial mistrust of juries, the influence of which in this sphere was frankly acknowledged by the Court of Appeal in McGregor.[23] A nice twist on this theme is provided by the judges in one of their resolutions in the case of Lord Morley,[24] in which it was said that the Statute of Stabbing, 1604

> "was only a declaration of the common law, and made to prevent the inconveniences of juries, who were apt to believe that to be a provocation to extenuate a murder which in law it was not".

Perhaps implicit in this desire to control juries is a desire to achieve uniformity in the application of the law. In one sense, justice requires that like cases be treated alike, and it is at least arguable that the vagaries of juries frustrate the accomplishment of this object.

In order to achieve control, the judges have utilised three devices. Originally, there was an insistence that malice was a question of law.[25] Since the effect of provocation was to "cast off the presumption of malice", it too was treated as a question of law. Coupled with this, and perhaps as a result of it, the judges tended to place limits on the sort of

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23. [1962] N.Z.L.R. 1069, 1075.

24. (1666) Kel. 55; 84 E.R. 1079.

25. Oneby (1727) 2 Ld. Raym. 1485; 92 E.R. 465. Fisher (1837) 8 C. & P. 182.

incident which could or could not constitute provocation. The use of this artifice led to fragmentation to the extent that, on occasion, the law threatened to founder in a quagmire of single instances. This point was appreciated by Stephen. Shortly before the enunciation of the reasonable man test, he criticised the law relating to indirect provocation saying;

> "It is easy to imagine injuries inflicted on near relations, which would be far harder to bear than blows. Most men would resent an asssult on their parents, children, wives or sisters, at least as much as an assault upon themselves. In short, the question of provocation is one which must be dealt with as it arises which ought not to be made the subject of rigid rules." 26

To some extent, these criticisms were blunted by the substitution of the reasonable man test for rigid rules five years later in Welsh,[27] but even after that case, judges continued to withdraw provocation on the basis that certain things done or said could not constitute provocation whether they might satisfy the reasonable man test or not.[28] In addition, Welsh laid the foundation for a further check, the importance of which was only gradually appreciated. Since the reasonable man test had expressly become an element of the defence, and since there must be evidence from which a jury could infer the existence of each element, there must be "evidence" that a reasonable man would have behaved as the offender did. Whether there is evidence of something in a criminal trial is a question of law for the judge to decide. This simple logic has created a potential

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26. "Capital Punishments" in Fraser's Magazine, Vol. LXIX, pp.766-7. Noted in the Royal Commission on Capital Punishment Report of 1953. Cmnd. 8932, para. 146.

27. (1869) 11 Cox C.C. 336.

28. See e.g. Supra pp.135-138.

stranglehold over the application of the defence, not greatly different in its effects from the malice rule which it replaced. It is proposed to examine the gradual evolution of this check, and the different approaches to it in England and New Zealand respectively.

1. The Common Law

In the half-century or so immediately preceding Welsh, the judges developed the practice of more readily leaving the sufficiency to the jury. Control was not abandoned entirely, and the course was adopted as a matter of practice, about which there was nothing obligatory.[29] The confusion surrounding this issue was the subject of a lengthy footnote in Eagle,[30] in which the judge is commended for allowing the jury to say whether there was "not malice". That no clear rule existed can be gathered from the direction of Keating J. in Welsh itself, when he told the jury that he was

> "bound to say that I am unable to discover in the evidence in this case any provocation which would suffice, or approach to such as would suffice, to reduce the crime to manslaughter. It has been laid down that mere words or gestures will not be sufficient to reduce the offence, and at all events the law is clear that the provocation must be serious. I have already said that I can discover no proof of such provocation in the evidence. If you can discover it you can give effect to it; but you are bound not to do so unless satisfied that it was serious."

Apparently the jury could not discover it either, and Welsh was convicted of murder. It may be that Keating J. was reluctant to withdraw the issue because there was some conflict in the

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29. Supra pp.33-39.

30. (1862) 2 F. & F. 827.

evidence. Welsh had started a fight in a tavern with his victim, who had obtained judgment in a civil action brought by Welsh. A more probable explanation is that Keating J. did not appreciate the logical implications of what he was saying. Nor did any other judge in the nineteenth century, and in Selten,[31] Rothwell[32] and Weston,[33] the issue of provocation was left to the jury in such a way as to allow them to determine the sufficiency of the provocative incident.

A change in direction started to become discernible only in the early years of this century. This was a gradual trend, rather than a sharp swing, and frequently, a ruling that there was no evidence of provocation was bolstered by reference to the absence of a legally recognised incident, or by reference to the lapse of time. Thus in Birchall,[34] in which the trial judge had withdrawn provocation, in addition to ruling that the mere suspicion of adultery was legally irrelevant, the Court of Criminal Appeal stated that

> "there was nothing to justify an ordinary man striking the deceased as the appellant did".

And although in Palmer,[35] counsel for the appellant argued that

> "It was for the jury to say whether under the circumstances the provocation was sufficient",

the appeal was dismissed without specific comment on this argument. That sufficiency was becoming to be recognised once

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31. (1871) 11 Cox C.C. 674.

32. (1871) 12 Cox C.C. 145.

33. (1879) 14 Cox C.C. 346.

34. (1913) 9 Cr.App.R. 91.

35. [1913] 2 K.B. 29.

again as a question for the judge is evident from the remarks of Bray J. in Greening,[36] where he said that

> "there is clear authority that in a case of supposed provocation a judge ought to tell the jury what amount of provocation would entitle them to return a verdict of manslaughter, and if there is no such evidence, to tell them so".

One of the early problems encountered arose out of the situation where the trial judge had withdrawn the question where there was a trivial yet legally recognisable provocation such as a minor assault. On what basis could a Court of Appeal say that the ruling was either correct or incorrect? When confronted by this in Hopper,[37] the Court flatly disagreed with the view taken by the trial judge saying

> "The reason why we have come to this conclusion is not from any new view of the law, but because there was sufficient evidence of facts and circumstances to justify the jury, if they took a certain view of them, in finding manslaughter. It is not for us to say whether or not they would have done so."

As a corollary, if the trial judge decided that there was no evidence of provocation, there was no way in which the Court of Criminal Appeal could be persuaded that he had made an error of law. This point is well illustrated by Robinson,[38] in which the trial judge had told the jury that its verdict must be one of murder or a complete acquittal. A verdict of murder was returned, but the jury added that

> "This was done without premeditation, in a fit of temper under provocation".

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36. (1913) 9 Cr.App.R. 105. And see the same Judge, arguendo in Alexander (1913) 9 Cr.App.R. 139.

37. [1915] 2 K.B. 431.

38. (1922) 16 Cr.App.R. 140.

It does not appear in the Report what was relied on as the provocative incident, and the main defence was that the death was equally compatible with suicide. Clearly, however, the jury disbelieved this, and inferred that something must have happened which caused the offender to kill. Thus, it seems that the main reason why there was no evidence of provocation was over the question of sufficiency. The appeal was dismissed.

In subsequent years, the Court of Criminal Appeal frequently agreed or disagreed with a trial judge's ruling that there was no evidence of provocation, but usually without specifying why it did so. Thus in Ball,[39] a conviction of murder was quashed simply because the Court of Criminal Appeal disagreed with the trial judge. Similarly in Hall[40] and Cobbett.[41] By contrast in Thorpe,[42] in which counsel did not mention the question of provocation at the trial, arguing that he was relying on the judge to exercise the duty imposed upon him by Hopper[43] to direct of his own initiative, it was held that, had the trial judge been asked for a formal ruling, he would have refused to leave provocation and would have been correct to do so.

It was not until the decision in Gauthier[44] that the power of the trial judge to withdraw the issue for lack of a

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39. (1924) 18 Cr.App.R. 149.

40. (1928) 21 Cr.App.R. 48.

41. (1940) 28 Cr.App.R. 11.

42. (1925) 18 Cr.App.R. 189.

43. [1915] 2 K.B. 431.

44. (1943) 29 Cr.App.R. 113. See esp. Cassels J. at 119.

sufficiently provocative act was rationalised in terms of the reasonable man. But the rule was stated most succinctly by Viscount Simon L.C. in Holmes v. D.P.P.,[45] when the allocation of the respective functions was explained as follows;

> "The distinction, therefore, is between asking 'could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?' (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable man to do what the accused did?' and, if so, 'Did the accused act under the stress of such provocation?'"

It is submitted that this represents the perfectly logical culmination of the decision in Welsh.[46] All that is really surprising is that it took the Courts so long to state explicitly what they had been doing in practice for the previous thirty years.

Such was the state of the law when the Report of the Royal Commission on Capital Punishment was presented. Dissatisfaction was felt with this aspect of the law, and the recommendation was made that the task of determining the question of sufficiency should be transferred to the jury.[47] Insofar as the resultant legislation, Section 3 of the Homicide Act, 1957[48] continues to use the word "provocation", it was perhaps open to the Courts to refuse to alter previous practice, and to require evidence upon which a jury could conclude that a reasonable man would have behaved as the offender did. Sir

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45. [1946] A.C. 588, 597.

46. (1869) 11 Cox. C.C. 336.

47. Cmnd. 8932 of 1953, para. 151.

48. For the text of which see supra Chapter III, fn. 117.

John Barry seems to have anticipated this possibility, and recognised tendencies of this sort in Australia, when he wrote that

> "In this field, often it is the jury that makes the law tolerable, for as they are not required to give reasons, in most instances they may be relied on to avoid an over-harsh application of the law. Though this may be unsatisfactory from the standpoint of legal theory, it is a compromise of a kind that is common in human affairs. The provisions found in the Codes, that whether any wrongful act or insult constitutes provocation, and whether it had that effect are questions of fact, are a recognition of the desirability of leaving the matter to the jury as the body expressing the sense and feeling of the community.
>
> Some judges have been inclined to interpret the Codes restrictively, and so far as possible to treat their provisions as doing no more than expressing neatly the effect of the decisions with which they are familiar. Such an inclination is the product of judicial conservatism and is to be deplored." 49

The inclination is nevertheless an understandable one, and the decision to treat the ordinary man test as one requiring no evidence places the test in a rather unique position. This may explain why it has so frequently been the subject of comment.[50] Surprise that it should be treated in this way is diminished by a consideration that the question of what a reasonable man might or might not do is essentially one of opinion, about which evidence, in the stricter sense, cannot be given in any case.[51]

So far, there is no evidence that the judges in England

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49. Barry; "The Defence of Provocation" (1949) 4 Res Judicatae 129, 141.

50. See e.g. the commentary on Simpson [1957] Crim.L.R. 815, Fantle [1959] Crim.L.R. 584, Wardrope [1960] Crim.L.R. 770. And see Smith and Hogan (1969) 2nd ed. p.210.

51. Phipson on Evidence 11th ed. 1970 para. 1296.

have succumbed to the temptation. In Robinson,[52] in which the offender killed his victim in the course of a street brawl, an appeal brought on the grounds that the trial judge should have directed the jury on provocation was unsuccessful. The Reporter surmises that the trial judge must have decided that there was no evidence that the accused lost his self-control, but the Report of the case does not actually say that this was the basis of the ruling. More significantly, in Finley,[53] the Court of Criminal Appeal quashed a conviction of murder (and substituted a sentence of three year's imprisonment) after the trial judge had ruled that there was no evidence that the accused had been provoked. In fact, the accused had made contradictory statements in the witness-box, saying both that he was "really mad", and at the same time agreeing with Counsel for the Crown that he had killed in cold blood, and it was held that this evidence was sufficient to raise a jury question.

Any doubts which may have lingered as to the correct interpretation of Section 3 on this point have now been dispelled by the decision of the Privy Council in Phillips,[54] in which identically worded legislation from Jamaica was being considered. Delivering the judgment of their Lordships, Lord Diplock said

> "In Holmes v. Director of Public Prosecutions [1946] A.C. 588, the case which finally decided that even a sudden confession of adultery could not amount to provocation at common law, it was laid down that although the [reasonable man test] was also one for the jury it was

52. [1965] Crim. L.R. 491.

53. [1965] Crim. L.R. 105.

54. [1969] 2 A.C. 130, 137.

> nevertheless the function of the judge to make a preliminary ruling as to whether or not the provocation was such as could provoke a reasonable man to react to it in the way in which the defendant did. It was this decision, not that in Mancini v. Director of Public Prosecutions [1942] A.C. 1 which was reversed by English legislation of 1957 and the Jamaican legislation of 1958."

This has been the basis of the approach of the Criminal Division of the Court of Appeal in two subsequent cases. In Cascoe,[55] the appellant had fired seven times at his attacker, hitting him with all seven shots. A conviction of manslaughter was substituted for one of murder. The Court commented that evidence of provocation was "extremely tenuous", but held that the jury might have concluded that the acts of the victim

> "so frightened and angered the appellant that he lost all control of himself and took up the gun, and in a passion fired it at Mr. Francis. We are far from saying that it is probable that the jury would have taken that view, All that we conclude is that there is evidence on which they could have taken that view. If they could have taken that view, then the question whether the provocation was enough to make a reasonable man do as the appellant did had to be left to be determined by the jury."

More recently in Brown,[56] Talbot J.'s concluding remarks were that the Court could not

> "see how any reasonable jury could have found in the present case that the provocation proved might have induced a reasonable man to act as the accused did".

This appears at first sight to be a reversion to pre-Homicide Act days, but it is submitted that the comments should be construed rather as a statement that, on the facts, no injustice had been done. Certainly, the Court did not say that, as a result, there was no evidence of provocation.

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55. [1970] 2 All E.R. 833, 836 per Salmon L.J.

56. [1972] 2 All E.R. 1328, 1333.

2. The New Zealand Law

As the English law has been moving in one direction, the New Zealand law has passed it going the other way. The Criminal Code Act, 1893 was drafted and enacted at a time when sufficiency was considered to be most properly a jury question. This is evident in the section of the Criminal Code Bill Commission Report dealing with provocation.[57] More interesting is the fact that this question should be singled out for comment in the section of the Report dealing with codification in general. It is pointed out that

> "Numerous instances occur in the draft code in which we have thus designedly and of necessity employed general language... In the provision relating to provocation, we speak of an 'insult of such a nature as to deprive an ordinary person of the power of self-control'; and many other expressions of the like kind occur in different parts of the draft code. All of them leave, and are intended to leave, a considerable latitude to the jury in applying the provisions of the draft code to particular states of fact. In other cases a considerable amount of discretion is given to the Court."

To achieve this, it was provided in Section 165(3) of the 1893 Act (re-enacted verbatim as Section 184(3) of the Crimes Act, 1908) that the questions

> "Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact".

This would seem to be similar to the Homicide Act, 1957, and in Jackson,[58] Chapman J. made a point of telling the jury that, whereas in England the rule was that words and gestures could not constitute provocation, he could not lay down a similar

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57. 1878-9 [C.2345]

58. [1918] N.Z.L.R. 363, 364.

rule here because

> "by the Crimes Act the Legislature has confided to you the whole question of the sufficiency of the provocation by wrongful act or insult."

In 1961, the legislation was amended by the insertion in Section 169 of subsection (3)[59] and by the interpolation in subsection (4) of the words, "if there is evidence of provocation". Adams suggests that subsection (3) does not alter the law, and that it was always for the judge to decide whether there was evidence fit for the consideration of the jury.[60] With respect, if these comments are intended to apply to the question of sufficiency as well as the other elements of the defence, this opinion is not borne out by the reported cases. It is true that in Malcolm,[61] the Court of Appeal stated that, where the evidence disclosed murder or nothing, the trial judge is entitled to tell the jury that it cannot find a verdict of manslaughter. That case however concerned a killing in the course of aggravated robbery, and there was no suggestion either that the offender had lost his self-control or that the victim had done anything which might cause him to do so. And in Stuck,[62] although the Court does say that there was no evidence of provocation, and no need therefore to consider the adequacy of the direction on the point, the gravamen of the appellant's complaint was that his conduct might have been interpreted by the jury as negligent, a submission which the Court of Appeal

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59. For the text of which see supra p.162.

60. Adams; 2nd ed. p.346, para. 1273.

61. [1951] N.Z.L.R. 470.

62. [1949] N.Z.L.R. 108.

accepted, and quashed a conviction of murder because there had been no reference to the possibility of a verdict of manslaughter being brought in on this basis.

It is submitted that neither of these cases can be interpreted as authority for the proposition that a trial judge may make a preliminary ruling on the question of sufficiency when the possibility of a provocation verdict arises. And in Kahu,[63] in which the trial judge clearly had misgivings about the sufficiency of what was done or said, the issue was nevertheless entrusted to the jury.

Be that as it may, he would clearly be entitled to do so now. In Anderson,[64] the Court of Appeal stated that

> "Now in England, there is no doubt at all that it is now enough that the provocation may have been sufficient momentarily to deprive a reasonable man of self-control. It is necessary for the Judge to ask himself, 'could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?'"

In support of this proposition the Court cites extensively from Lee Chun Chuen[65] and Holmes v. D.P.P.[66] Enough has already been said to indicate that, with respect, this no longer represents English law, and did not do so in 1965 either. But applying that test, the Court ruled that there was no evidence of provocation and the appeal was dismissed. It is submitted, however, that the purpose of introducing Section 169(3) was to introduce the pre-1957 Common law, and that,

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63. [1947] N.Z.L.R. 368.

64. [1965] N.Z.L.R. 29, 36.

65. [1963] A.C. 220.

66. [1946] A.C. 588.

whatever the process which the Court used to arrive at its decision, the result is above criticism. It may be noted however, that when in Millar,[67] counsel complained that the trial judge did not direct the jury on the question of provocation when he should have done so, he faced the same difficulties as were experienced by counsel in Robinson;[68] there is no way in which he can argue that the judge erred in law when he exercised the power conferred by Section 169(3). The best that can be hoped for is that the Court of Appeal will disagree, with the opinion held by the trial judge

D) Conclusion

It is submitted that the present New Zealand law is unfortunate in several respects, and that, by comparison, the Homicide Act, 1957 has created a tolerable and workable compromise. It retains the objective test without pressing it to what is, admittedly, a logical conclusion. Nor is the present New Zealand approach calculated to achieve the degree of consistency which the Courts evidently desire. The defect in the present law is that it fails or refuses to recognise that the ordinary man test is a question of opinion. To some extent, it is true, the personal element is removed from the judge's decision by the test which he is required to apply; it is not his opinion as to the issue which counts, but whether in his view twelve reasonable men might form the opinion or have doubts about whether an ordinary man would have lost his self-control. But any illusions about consistency which this may create must be at least shaken by the English experience at the beginning of this century. And if the example of Parker[69] is

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67. (1971) unreported C.A. 96/71.

68. (1922) 16 Cr.App.R. 140. See supra fn. 38.

69. (1963) 111 C.L.R. 610.

anything by which to judge, it would seem that the judicial ability to predict the reaction of a jury does not increase with experience. Applying precisely the test just outlined in the High Court of Australia, Dixon C.J. and Windeyer J. concluded that there was evidence of provocation and Taylor, Menzies and Owen J.J. decided that there was not.

In any case, it is submitted, past experience shows that consistency, admirable though it may be as an end in itself, tends to lead to rigidity. In refusing to permit words alone to amount to provocation the Courts were in one sense consistent. But as a measure of the provocative effect of conduct, such all or nothing rules had little to commend them. In defining provocation as "anything done or said", the Crimes Act, 1961 has to an extent obviated this difficulty. But one consequence of this is that a trial judge now has no guides (other than his own opinion) upon which to decide whether there is evidence of provocation. Is it not arguable that, potentially, the law is even more capricious than it was before 1961?

There is no evidence in the reported English cases since 1957 of the "inconveniences of juries". Cascoe,[70] in which the Criminal Division of the Court of Appeal quashed a conviction of murder and refused to interfere with the sentence imposed, serves as a reminder of the consequences of a finding of manslaughter rather than murder; it simply gives a trial judge a discretion as to sentence. It is therefore submitted that the present law should be changed, and that the sufficiency of a provocative incident should be treated as a matter for the opinion of the jury.

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70. [1970] 2 All E.R. 833.

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